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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. ~~234~~ 604 300

GEORGE L. THAYER, TRUSTEE, PLAINTIFF IN ERROR,

vs.

PETER BUTLER, RECEIVER OF THE PACIFIC NATIONAL BANK OF BOSTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED NOVEMBER 23, 1887.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1308.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, FEBRUARY 28, 1888.

1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Peter Butler, of Boston, in the district of Massachusetts, receiver of the Pacific National Bank of Boston, plaintiff, and George L. Thayer, of said Boston, trustee, defendant, in an action of contract, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done herein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the seventh day of October, in the year of our Lord one thousand eight hundred and eighty-seven.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
THOS. L. NELSON, *Dist. Judge.*

2 CIRCUIT COURT OF THE UNITED STATES, *District of Massachusetts,* } *ss:*

And now here the judges of the circuit court of the United States in and for the district of Massachusetts, make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John G. Stetson, clerk of said circuit court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court this seventh day of October, A. D. 1887.

[Seal of the Circuit Court, Massachusetts.]

JOHN G. STETSON, *Clerk.*

3 UNITED STATES OF AMERICA, }
Massachusetts District, } *ss.*:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Monday, the sixteenth day of May, in the year of our Lord one thousand eight hundred and eighty-seven, the fifteenth day of said May happening on a Sunday.

Before the Honorable Le Baron B. Colt, circuit judge.

PETER BUTLER, of Boston, in the State of Massachusetts, Receiver of the Pacific National Bank of Boston, Plaintiff,

v.

GEORGE L. THAYER, Trustee, of Boston, in said District, Defendant.

In an action of contract.

The following declaration was filed with plaintiff's writ:

4 *Plaintiff's Declaration.* (*Filed with Plaintiff's Writ.*)

Circuit Court of the United States, District of Massachusetts.

LINUS M. PRICE, Receiver, *vs.* GEORGE L. THAYER, Tr.

Plaintiff says that the Pacific National Bank of Boston, heretofore and prior to the acts herein mentioned, was duly organized and authorized to do business as a national bank or banking association under and by virtue of an act of Congress entitled "An act to provide a national currency secured by a pledge of United States bonds and to provided for the circulation and redemption thereof," approved on the 3d day of June, A. D. 1864, and which said provisions are embraced in title sixty-two of the Revised Statutes of the United States, located and having its banking-house at Boston, in State of Massachusetts; that said banking association thereupon proceeded and for a long time thereafter continued to issue currency and receive deposits of money, discount negotiable paper, and generally to transact the business of a national banking association, as authorized by the aforesaid act of Congress; that in its said business as aforesaid the said banking association contracted, prior to the 22d day of May, A. D. 1882, large debts and liabilities, and that, to wit, on the 22d day of May, A. D. 1882, the Comptroller of the Currency of the United States was satisfied from a report of proceedings of the board of directors of the Pacific National Bank of Boston previously made to said Comptroller that said banking association, the Pacific National Bank of Boston aforesaid, was insolvent and unable to pay its debts and liabilities; that the said Comptroller of the Currency, upon being satisfied of the insolvency of said banking association as aforesaid, did, to wit, on the 22d day of May, A. D. 1882, and as authorized and empowered to do by virtue of section one of an act of Congress entitled "An act authorizing the appointment of receivers of national banks, and for other purposes," approved on the 30th day of June, A. D. 1876, duly appoint the said Linus M. Price re-

ceiver of all the property, books, records, and assets of the said banking association, as is provided by law, and the said Linus M. Price accepted said appointment and duly qualified as such receiver aforesaid and executed such bond and with such surety as required by the laws of the United States and approved by said Comptroller, and which said appointment more fully appears by a copy thereof, hereto annexed, marked "Schedule A," or to the original of which, ready to be produced in court, the said plaintiff craves leave to refer; that thereupon the said plaintiff, under the direction of the said Comptroller, took possession of the books, records, property, and assets of every description of the Pacific National Bank of Boston aforesaid, and has ever since been and is now engaged in collecting and converting the assets thereof and discharging in other respects the lawful duties of his said receivership.

And the plaintiff avers that the property and assets of said banking association are insufficient to pay and satisfy its debts and liabilities contracted as aforesaid, and that in order to provide for the paying of the same it became and was and is now necessary to enforce the personal liabilities of the stockholders, as is provided and imposed by said act of Congress.

And the said plaintiff further avers that the said Comptroller of the Currency did ascertain and determine upon data satisfactory to him that the assets and credits of said association were insufficient to pay its said debts and liabilities, and that in order to provide the money necessary to pay said debts and liabilities of said association it was necessary to enforce the individual liability of the shareholders of said association, as provided by the aforesaid act of Congress, and especially by the twelfth section thereof (section 5151, U. S. Rev. Statutes), and that said Comptroller, in pursuance of the powers for that purpose vested in him by the aforesaid act of Congress and to that end, did, to wit, on the 27th day of November, A. D. 1882, order and make an assessment upon the said shareholders of said association, including the said defendant in this action, and each and every one of them equally and ratably to the amount of one hundred *dollars* per centum (100 per cent.) of the par value of the shares of the capital stock in the said association held or owned by them, respectively, including the defendant, at the time of its insolvency, failure, or suspension as aforesaid, which said assessment more fully appears by a copy of the order making the same, hereto annexed, marked "Schedule B," or to the original thereof, ready in court to be produced, and to which the said plaintiff craves leave to refer.

And the said plaintiff further avers that the said Comptroller has decided that it is now necessary to institute a suit or suits against the said shareholders, including the defendant, to enforce their said personal liability, and to that end has ordered and directed the said plaintiff to institute in the proper court or courts such suit or suits as may be necessary to enforce against each and every shareholder of the said association equally and ratably his or her personal liability as such shareholder in manner and to the extent provided by the twelfth section of said act (section 5151, U. S. Rev. Statutes)—that is to say, the rate of one hundred per cent. hereinbefore specified.

And the said plaintiff further avers that the said defendant was at the time of said insolvency, failure, or suspension of said banking association a shareholder of its capital stock to the amount of eighty shares, of the par value of one hundred dollars per share, and of the aggregate value at par of eight thousand dollars, and held or was entitled to hold in his possession or control the usual stock certificates as such shareholder in said banking association, and that, to wit, on the first day of December, A. D. 1882, the said plaintiff made demand in writing upon the said defendant as such shareholder for payment of the sum of eight thousand dollars, the amount of said assessment so made as aforesaid under and by virtue of the order of the Comptroller of the Currency, hereto annexed and marked "Schedule B," as aforesaid.

And the said plaintiff avers that by reason of the premises the said defendant has become and now is indebted and liable to pay to the plaintiff as such receiver one hundred per cent. of the amount of said capital stock—that is, one hundred dollars—upon each and every share so held and owned by the said defendant at the time of the declared insolvency, failure, and suspension of said banking association as aforesaid, and which said liability or indebtedness of the defendant amounts in the whole to the sum of eight thousand dollars; which said sum of money so due, owing, and payable to the said plaintiff as receiver aforesaid, though often requested, the said defendant has not paid the same or any part thereof, but has wholly neglected and refused, and still does neglect and refuse so to do.

Plaintiff says defendant is described in the certificate of said eighty shares of stock and on said bank's stock ledger as tr., but plaintiff is informed and believes that defendant holds said stock and owns same, and that said tr. is used as description merely and said stock is not held by him in trust, and so alleges, and defendant owes plaintiff the said sum, with interest, which is demanded.

RANNEY & CLARK, *Att'ys.*

SCHEDULE A, referred to in foregoing declaration.

WASHINGTON, *May* 22, 1882.

Whereas it appears from the report of proceedings of the board of directors of the Pacific National Bank of Boston, located in the city of Boston, county of Suffolk, and State of Massachusetts, at a meeting held on May 20, 1882, that the said bank is insolvent, and being satisfied that the said bank is insolvent and unable to pay its just and legal debts:

Now, therefore, I, John Jay Knox, Comptroller of the Currency, in pursuance of the power and authority vested in me by law and under the provisions of sect. 1 of an act of Congress entitled "An act authorizing the appointment of receivers of national banks, and for other purposes," approved June 30, 1876, do hereby appoint Linus M. Price receiver of the Pacific National Bank of Boston, with all the powers, duties, and responsibilities given to or imposed upon

a receiver under provisions of the Revised Statutes of the United States which authorize the appointment of a receiver.

In witness whereof I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the city of Washington, in the District of Columbia, this twenty-second day of May, A. D. 1882.

[L. S.] (Signed) JOHN JAY KNOX,
Comptroller of the Currency.

SCHEDULE B, referred to in foregoing declaration.

In the Matter of "THE PACIFIC NATIONAL BANK OF BOSTON," Massachusetts.

To all whom it may concern:

This is to certify that I have taken an accounting of the condition of the estate of the Pacific National Bank of Boston, Massachusetts, aforesaid, and of its assets and liabilities, and I do find and determine, upon data satisfactory to me, that in order to provide the money necessary to pay the debts of said association it is necessary now to enforce to the extent hereinafter mentioned the individual liability of the shareholders of said association provided for by the twelfth section of the act of Congress entitled "An act to provide a national currency," approved June 3, 1864, and by sect. 5151 of the Revised Statutes of the United States, approved June 22, 1874, and to that end and in pursuance of the powers vested in me by the said acts I have made, and hereby order and make, an assessment or requisition upon the shareholders of said association or bank and each and every one of them equally and ratably to the amount of one hundred per centum of the par value of the shares of the capital stock in the said association held or owned by them, respectively, at the time of its failure or suspension, and I direct Linus M. Price, receiver, heretofore appointed, of the said association, to take the necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders.

In witness whereof I have hereto set my hand and caused my seal of office to be affixed to these presents, at the city of Washington, in the District of Columbia, this twenty-seventh day of November, A. D. 1882.

[L. S.] (Signed) JOHN JAY KNOX,
Comptroller of the Currency.

6 The writ in this cause is dated the fourteenth day of March, A. D. 1883, and was duly entered at the May term of this court, A. D. 1883, when and where the parties appeared, by their respective attorneys.

On the second day of June, A. D. 1883, the following answer and declaration in set-off was filed:

Answer and Declaration in Set-off. (*Filed June* 2, 1883.)

Defendant's answer.

The defendant denies each and every allegation in the plaintiff's writ and declaration contained.

By his att'y, J. H. BENTON, JR.

Declaration in set-off.

The defendant says that the Pacific National Bank, of which the plaintiff says he is receiver, was and the plaintiff, as receiver, is indebted to him in the sum of four thousand dollars and interest thereon from the twenty-eighth day of September, 1881, for money had and received by said bank to his use at that time.

7 And in a second count, for the same cause of set-off, the defendant says that on the twenty-eighth day of September, 1881, he paid to said Pacific National Bank four thousand dollars, which it then agreed to apply in payment for forty shares, of the par value of one hundred dollars each, of capital stock in said bank in an increase of stock of said bank of the amount of five hundred thousand dollars, which increase of five hundred thousand dollars it then agreed to make and to issue to him within a reasonable time after the said twenty-eighth day of September forty shares of said increase of the capital of the par value of one hundred dollars each; and the defendant says that said bank did not within a reasonable time thereafter issue to him forty shares of said stock of the par value of one hundred dollars each, in an increase of five hundred thousand dollars of said capital stock, but wholly failed to increase its capital stock five hundred thousand dollars and to issue to him forty shares of said increase.

And he says that he has demanded said money of said bank and of the plaintiff, but neither the bank nor the plaintiff have paid the same to him, but have wholly refused and neglected so to do.

8 And the defendant says that he is willing to set-off and apply so much of said four thousand dollars and interest as may be necessary to pay any sum which may be found due from him to the plaintiff upon the causes of action set forth in the plaintiff's declaration.

J. H. BENTON, JR.

This cause was thence continued from term to term to the October term, A. D. 1885, when the following motion was filed:

Motion of Peter Butler, Receiver. (*Filed May* 10, 1886.)

Peter Butler, of Boston, in the district of Massachusetts, represents that he has been duly appointed and qualified as receiver of the Pacific National Bank in place of Linus M. Price, removed. He therefore asks to be admitted as a party plaintiff in said action and for leave to prosecute the same in substitution for said Price.

By his attorneys, RANNEY & CLARK.

Which motion was allowed by the court.

9 This cause was thence continued from term to term to this present term, when the following offer of judgment was filed:

Offer of Judgment. (*Filed May* 20, 1887.)

And now comes the defendant and offers in court and consents in writing to be defaulted, and that judgment shall be rendered against him as damages for the sum of five thousand and eighty dollars and costs, to be taxed.

By J. H. BENTON, JR., *Att'y.*

On the thirty-first day of May, A. D. 1887, the following agreement is filed:

Agreement Waiving Jury Trial. (*Filed May* 31, 1887.)

It is mutually agreed that a jury trial is waived in each of said cases (this case and same plaintiff herein *v.* Mary J. Eaton), and the cases are to be submitted to the court.

RANNEY & CLARK,
For Plaintiff.
J. H. BENTON, JR.,
For Defendant.

10 This cause thereupon comes on to be heard by the court, and is argued by counsel for the respective parties, the Honorable Thomas L. Nelson, district judge, sitting.

It is thereupon considered by the court, to wit, October 7, 1887, the Honorable Thomas L. Nelson, district judge, sitting, that the said Peter Butler, receiver, plaintiff, recover of the said George L. Thayer, from the estate and funds of Olive T. Child in the hands of said George L. Thayer, as trustee under the will of George W. Thayer, deceased, the sum of ten thousand and three hundred and fifty-four dollars damages and his costs of suit, taxed at eighty-three dollars and eighteen cents.

The following bill of exceptions is allowed by the court and by direction of the court is filed as of October 7, A. D. 1887, before entry of judgment herein, and made part of the record in said cause.

Defendant's Exceptions. (*Filed as of Oct.* 7, 1887.)

This cause was submitted to the court upon the following agreed statement of facts, admitted by both parties for the purposes of this case, saving to each all objections to the competency or materiality of any portion thereof, no objection being taken, however, as to form or mode of proof.

11 *Statement of Facts.*

The Pacific National Bank of Boston, Massachusetts, a national banking association created under the national banking acts of Congress, being insolvent on May 22, 1882, the Comptroller of the Currency, by action appearing in his order or certificate annexed to

declaration, marked "Schedule A," appointed Linus M. Price receiver, and the bank then passed into his hands to be wound up. On November 27th, 1882, for the purpose of enforcing the alleged individual liability of the stockholders, the said Comptroller made the order of assessment appearing in "Schedule B," annexed to the declaration, and defendant not paying on notice and demand this suit was brought. Peter Butler was appointed receiver on March 18th, 1886, in place of said Price, removed. A copy of articles five and six of its articles of association, being all thereof that are material to this suit, is as follows:

"Fifth. The capital stock of this association shall be two hundred and fifty thousand dollars, to be divided into shares of one hundred dollars each, but the capital may be increased, according to the provisions of section 5142 of the Revised Statutes, to any sum not exceeding ten hundred thousand dollars; and in the case of the increase of capital of the association each stockholder shall have the privilege of subscribing for such number of shares of the proposed increase of the capital stock as he may be entitled to according to the number of shares owned by him before the stock is increased.

"Sixth. The board of directors (a majority of whom shall be a quorum to do business) shall elect one of their number to be president of this association, who shall hold this office (unless he shall be disqualified or be sooner removed by a two-thirds vote of all the members of the board) for the term for which he was elected a director, and they shall have power to elect a vice-president, who shall also be a member of the board of directors, and to elect or appoint a cashier and other such officers and clerks as may be required to transact the business of the association, to fix the salaries
12 to be paid to them, and continue them in office or dismiss them, as, in the opinion of a majority of the board, the interests of the association may demand. They shall have power to define the duties of the officers and clerks of the association, to require bonds from them, and to fix the penalty thereof; to regulate the manner in which elections of directors shall be held and to appoint judges of the elections; to provide for an increase of the capital of the association and to regulate the manner in which such increase shall be made, and generally to do and perform all the acts that it may be legal for a board of directors to do under the Revised Statutes aforesaid; and they shall also have the power to make all by-laws that it may be proper and convenient for them to make under said Revised Statutes for the general regulation of the business of the association and the management and administration of its affairs, which by-laws may prohibit, if the directors shall so determine, the transfer of stock owned by any stockholder who may be liable to this association, either as principal, debtor, or otherwise, without the consent of the board."

Section eleven of the by-laws of the bank, being all therein which is material to this suit, is as follows:

"Whenever an increase of stock shall be determined upon it shall be the duty of the board to notify all the stockholders of the same and cause a subscription to be opened for such increase, and each

stockholder shall have the privilege of subscribing for such number of shares of new stock as he may be entitled to subscribe for in proportion to his existing stock in the bank. If any stockholder shall fail to subscribe for the amount of stock to which he may be entitled within a reasonable time, which shall be stated in the notice, the directors may determine what disposition shall be made of the privilege of subscribing for the new stock."

On the 13th of September, 1881, the capital stock of the bank, as increased prior, was $500,000, divided into 5,000 shares of the par value of $100 each, of which shares the defendant, as trustee under the will of George W. Thayer, for the benefit of Olive T. Child, owned forty, which stood in the name of George L. Thayer, trustee, on the books of the bank, the certificate for said shares having been taken in the name of one of the trustees only, for convenience, as the other trustee, J. H. Thayer, resided in New York, and the business of the trust was managed by George L. Thayer, who resided in Boston. The fact that these forty shares belonged to the trust of which the said Thayer was trustee was known to the president of the bank. The following is a copy of the certificate then and ever since held by the defendant:

"No. 170. 40 shares.

The Pacific National Bank of Boston, Massachusetts.

This certifies that George L. Thayer, trustee, is proprietor
13 of forty shares in the capital stock of the Pacific National Bank of Boston, Mass., transferable only on the books of the said bank, in person or by attorney, on surrender of this certificate.

Boston, January 16th, 1878.

A. I BENYON, *President.*
F. J. CHICK, *Cashier.*"

There was no controversy as to the right of the plaintiff to recover the assessment sued for on the stock represented by this certificate, and the same is conceded.

September 13, 1881, the directors of the bank passed the following vote:

"Voted, That the capital of this bank be increased to one million dollars, and that stockholders of this date have the right to take the new stock at par in an amount equal to that now held by them."

The following notice was thereupon sent to all the stockholders of the bank:

"A. I. Benyon, president. J. M. Pettengill, cashier.

"Pacific National Bank, 105 Devonshire street.

"BOSTON, *Sept.* 13, 1881.

"At a meeting of the directors of this bank held this day it was—
"Voted, That the capital of this bank be increased to one million

dollars, and that the stockholders of this date have the right to take the new stock at par in equal amounts to that now held by them.

"Subscription to the new stock payable October 1st. Parties desiring to anticipate payment will be allowed interest to that date at four per cent. per annum.

"J. M. PETTENGILL, *Cashier*."

At the bottom of this printed notice there was left a space and lines indicated for stockholders to write therein their subscriptions to the new stock to which they were entitled. Other than this there was no subscription paper opened. Some stockholders signified their assent on the notice in the place indicated at the bottom and sent it to the bank. Others, including the defendant, did not, but went or sent to the bank and paid the money for the new stock to which they would be entitled in the proposed increase, taking receipts in the printed form prepared for that purpose.

September 28, 1881, George L. Thayer, the defendant, went to the bank and paid $4,000 from the money of the trust of which the said Thayer was trustee, and received therefor a receipt, a copy of which is as follows:

14 *Copy of the Receipt.*

"Pacific National Bank.

"$4,000. *Sep.* 28.

"BOSTON, *October 1st*, 1881.

"Received of Geo. L. Thayer, trustee, four thousand dollars on account of subscription to new stock.

"J. M. PETTENGILL, *Cashier*."

He also, at the same time, acting for Mary J. Eaton, who had forty shares of the capital stock of the bank, paid the same amount and took a similar receipt to her. Payments on account of the stock in the said proposed increase, each party paying the par value of the shares to which he was entitled, to the amount of $330,100 were made on and prior to October 1, 1881, at which time in making the sworn official return to the Comptroller of the Currency of the condition of the bank on that date the bank officials reported the amount of its capital paid in at $830,100. Additional payments were made on account of stock in the said proposed increase, each paying the par value, until the fifteenth day of November, 1881. On the 18th day of November, 1881, the bank became unable to pay its debts and liabilities, suspended payment thereof, failed to redeem its circulating notes, and thereupon closed its doors to business. The following is a copy of vote of that date to suspend: "Voted, To temporarily suspend." A schedule showing the dates and amounts of the respective payments in the aggregate each day on account of stock in the said proposed increase is hereto annexed, marked "Exhibit A." The whole amount thus paid in was $461,370.

The money thus paid up in to October 1 was deposited in a separate account in the bank to the credit of its cashier, as trustee, and the

$330,100 which thus stood to his credit, as trustee, October 1, was then carried to the account of "new capital stock" on the books of the Bank, to which account all sums subsequently paid on account of stock in the proposed increase were credited, and all the money thus paid in was used in the general business of the bank. No payments were made to the bank on account of the said proposed increase of $500,000 except those to the amount of $461,370, made as hereinbefore stated. No notice was transmitted to the Comptroller of the Currency of the payment of such proposed increase, or of any increase except as herein stated, and the Comptroller did not certify his approval of such increase or of any increase or of the payment thereof except as herein stated.

The president and cashier of the bank began to issue certificates for stock in the proposed increase on October 1, 1881, and thereafter issued them from time to time as called for to those who had paid, and on November 18, 1881, certificates bearing date Oct. 1, 1881, representing all but three hundred and fifty-four shares of the $461,370, had been thus delivered and the shares credited to the accounts of the respective parties on or as of October 1, 1881, on the stock ledger of the bank. There was no vote of the directors on the subject of issuing the certificates, but it was done with their knowledge and they were among the number of stockholders who took them. The books of the bank also show that three hundred and fifty shares represented by certificates thus issued in the proposed increase had been transferred to third parties, the original certificates surrendered to the bank and new ones issued therefor prior to November 18, 1881. A certificate and stub, of which the following is a copy, was made out ready for delivery, but still remains in the certificate book of the bank, it once having been cut off and pasted again to the stub, as were all certificates not delivered:

40. No. 918. 40 shares.

The Pacific National Bank of Boston, Massachusetts.

This certifies that George L. Thayer, trustee, of Boston, is proprietor of forty shares in the capital stock of the Pacific National Bank, Boston, Mass., transferable only on the books of said bank, in person or by attorney, on surrender of this certificate.

No. 918. Date, Octo. 1, 1881. Issued to Geo. L. Thayer, trustee, of Boston.

A. I. BENYON, *President.*
J. M. PETTENGILL, *Cashier.*

The bank kept a book called the stock ledger, containing, in ledger form, with an index, the names of the stockholders, with their places of residence, and showing, in a credit and debit stock account with each one, the number of shares held by each. The entry therein relating to the defendant as it stood at the time of the appointment of the receiver and stands now is as follows, viz:

"Geo. L. Thayer, trustee, Boston.

1880.			1878.		
Sep. 1.	To 40 shares, 40--	4,000	Jan. 16.	By 40 shares, 40--	4,000
			1880.		
			Jan. 1.	" 40 do. 40--	4,000
			1881.		
			Oct 1.	" 40 do. 40--	4,000"

The accounts with other shareholders were similar in form to this and the bank kept no other list of the names and residences of its shareholders and the number of shares held by each.

At what time this certificate and entry were made does not appear except by the books. This certificate was never called for, taken by, or tendered to said Thayer or to the defendant, and neither of them had any knowledge that the certificate or entry was made, unless it is implied from facts hereinafter found and stated. No certificates in the proposed increase were ever tendered by the bank to any persons to whom they were made, but were delivered when called for.

Daniel Needham, a national bank examiner, being requested to do so by a vote of the directors of November 19th, 1881, and acting also by virtue of his office, proceeded to and did examine and report upon the condition of the bank as it was November 18th, 1881, to the bank and the Comptroller of the Currency, a copy of the report being annexed, marked "Exhibit B." In this report the matter of the capital stock was stated thus:

Capital stock paid in	$500,000
New capital stock paid in	461,370

He was placed in charge and possession of the bank and of its funds, assets, records, and books by said Comptroller for the purposes of an examination, and the bank remained under his
16 charge and possession with its doors closed to general business until on or about March 18, 1882, the directors having meantime no control or possession of the assets of the bank or the moneys received or paid out on its account except under the supervision and control of said examiner.

Between December 8 and December 13, 1881, the counsel of the bank, in pursuance of a vote of its directors of the former date, went to Washington, had a conference with the Comptroller of the Currency, and explained the situation of the bank's affairs to him, and after discussion of matters between them returned, and on December 13, 1881, the directors of the bank passed the following votes as the result of such conference and discussion:

"Voted, That whereas it was voted by this board, on the thirteenth day of September last, that the capital of this bank be increased to one million dollars, and that the stockholders of this date have the right to take the new stock at par in equal amounts to that held by them;

And whereas the stockholders were duly notified of said vote, and also that subscriptions to the new stock should be payable October first;

And whereas $461,300 of said new stock has been taken and paid in;

And whereas $38,700 thereof has not been taken and paid in:

Voted, That said $38,700 of said stock be, and is hereby, cancelled and deducted from said capital stock of $1,000,000, and that the paid-up capital stock of this association amounts to $961,300.

Voted, That the Comptroller of the Currency be notified that the capital of this association has been increased in the sum of $461,300, and that the whole amount of said increase has been paid in as part of the capital of this association, and that he be requested to issue his certificate of said increase to this association according to law."

After November 18, 1881, no more of the new stock or the rights could be sold at par.

The proceedings of the directors' meetings of December 10, of December 14th, 1881, and of January 2, 1882, copies of which were sent at the time to the Comptroller of the Currency, and the correspondence between the said Comptroller and said Needham appear in Exhibits hereto annexed, marked, respectively, C, D, E, F, and G.

The cashier of the defendant, by direction of the directors,
17 sent the following certificate, duly sworn to by the cashier, to the Comptroller of the Currency, together with a copy of the foregoing votes of December 13, 1881.

"PACIFIC NATIONAL BANK OF BOSTON,
DECEMBER 31, 1881.

To the Comptroller of the Currency, Washington, D. C.:

It is hereby certified that the capital stock of the Pacific National Bank of Boston has been increased, pursuant to the articles of association of said bank, in the sum of four hundred and sixty-one thousand three hundred dollars, all of which has been paid in, and that the paid-up capital stock of said bank now amounts to nine hundred and sixty-one thousand three hundred dollars.

[SEAL.] J. M. PETTENGILL, *Cashier*."

(Jurat omitted.)

On receipt of said certificate and copy the Comptroller of the Currency sent to the bank the following certificate:

"TREASURY DEPARTMENT,
OFFICE OF THE COMPTROLLER OF THE CURRENCY,
WASHINGTON, *Dec.* 16, 1881.

Whereas satisfactory notice has been transmitted to the Comptroller of the Currency that the capital stock of 'The Pacific National Bank of Boston, Mass.,' has been increased to the sum of four hundred and sixty-one thousand three hundred dollars, in accordance with its articles of association, and that the whole amount of such increase has been paid in: Now, it is hereby certified that the capital

stock of 'The Pacific National Bank of Boston, Mass.,' aforesaid has been increased as aforesaid in the sum of four hundred and sixty-one thousand three hundred dollars; that said increase of capital has been paid in to said bank as a part of the capital thereof, and that the said increase of capital stock is approved by the Comptroller of the Currency.

In witness whereof I hereunto affix my official signature.

[SEAL.] JOHN J. KNOX,
Comptroller."

There was no vote of the stockholders of the bank relating to the increase or reduction of its capital stock, unless it be that of January 10th, 1882. On the 16th of December the Comptroller sent to the bank the following communication:

18 "WASHINGTON, *Dec.* 16, 1881.

To the Pacific National Bank of Boston, Massachusetts:

The entire capital of the Pacific National Bank of Boston, Massachusetts, amounting to nine hundred and sixty-one thousand three hundred dollars ($961,300), having been lost, notice is hereby given to said bank, under the provisions of section 5205 of the Revised Statutes of the United States, to pay the deficiency in its capital stock by an assessment of one hundred per cent. upon its shareholders *pro rata* for the amount of capital stock held by each, and that if such deficiency shall not be paid, and said bank shall refuse to go into liquidation, as provided by law, for three months after this notice shall have been received by it, a receiver may be appointed to close up the business of the association according to the provisions of section 5234 of Revised Statutes of the United States.

In testimony whereof I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the Treasury Department, in the city of Washington and District of Columbia, this sixteenth day of December, A. D. 1881.

[SEAL.] JOHN JAY KNOX,
Comptroller of the Currency."

No communication was made to the defendant or his cotrustee with reference to said votes of the directors of December 10, 13, and 14, or with reference to any change in the proposed increase of the capital of the bank, and no notice was given him or them that any certificate had been made of stock in said supposed increase, and neither he nor they ever assented to any change in the proposed increase in the sum of $500,000, unless such notice and assent is found in or implied from facts herein found and stated. After paying the $1,000 on September 28 neither of them appears to have taken any action or made any inquiry with reference to the stock in the proposed increase, except as shown by the facts herein found on the testimony of defendant, until the 10th of January, 1882, when, before the opening of the annual meeting hereinafter referred to, said trustee made the following demand upon the bank, in writing, delivered to its president:

"BOSTON, *January* 10, 1882.

To the Pacific National Bank:

The conditions upon which you received $4,000 of us on the 28th day of September, 1881, not having been performed, we hereby demand repayment of said $4,000.

GEORGE L. THAYER AND
J. H. THAYER, *Trustees*,
By GEORGE L. THAYER."

The votes of the directors were recorded on the books of the bank kept at the bank, but the said trustees never looked at the books to ascertain what, if anything, had been done with reference to the proposed increase of capital.

19 December 19th, 1881, the directors voted to call the annual meeting of the stockholders, to be held January 10, 1882, and the following notice was printed in newspapers published in Boston, and was received by the plaintiffs:

"Pacific National Bank.

The annual meeting of the stockholders of this bank for the choice of directors, and for any other business which may legally come before them, will be held at their banking rooms, 105 Devonshire street, on Tuesday, January 10, 1882, at eleven o'clock in the forenoon.

J. M. PETTENGILL."

Special notice was also sent to the stockholders that the matter of the assessment would come up for action. At this meeting the examiner made a report of the condition of the bank, a board of directors was chosen, and after a discussion and statement by the counsel of the bank of the facts in regard to the increase of its capital stock and a discussion as to how much in fact had been paid in under the vote to increase it to a million dollars, and of the legal result thereof, and of the vote of December 13, 1881, and statements that there had been conferences with the Comptroller of the Currency in reference to the position on that question, the order or notice of the Comptroller of December 16th, 1881, being read, and it being stated that unless the assessment was made the bank would have to go into the hands of a receiver as therein stated, the following vote was adopted by a stock vote of 5,494 shares in favor and 55 shares against, viz:

"Voted, in accordance with the notice of the Comptroller of the Currency, dated December 16, 1881, there be, and hereby is, laid an assessment of one hundred per cent. upon the shareholders of the Pacific National Bank of Boston, Mass., *pro rata*, for the amount of capital stock of said bank held by each shareholder.

Voted, That the board of directors notify each shareholder of said assessment and collect the same forthwith."

Of the $961,300 assessed, $742,300 was paid under this vote, plaintiff paying nothing thereon. The defendant did not attend such meeting, but his counsel was present, acting as proxy for Mary J.

Eaton, and representing only the forty shares of the original stock held by her in the bank. He acted as one of the committee to collect, sort, and count the votes cast, but he did not vote upon any stock.

March 14, 1882, the defendant brought suit in the State court to recover said $4,000. March 18, 1882, by permission of the Comptroller of the Currency, the directors took full possession of the assets of the bank, the bank resumed and continued to do a general banking business, claiming that the capital of the bank was $961,300, until May 20, 1882, when the bank again stopped payment, closing its doors, and on May 22, 1882, Linus M. Price
20–21 was appointed receiver of the bank by the Comptroller, and the bank passed into his hands to be wound up, with liabilities of about $2,500,000 and assets worth about $500,000.

It appeared that before the meeting of the stockholders the counsel of the defendant met the counsel for the bank with reference to their claim that the mony paid by them should be paid back if the whole amount was not subscribed, defendant's counsel claiming that the money should be paid back, because the additional increase had not all been taken and paid in.

EXHIBIT A.

List of Payments on Account of New Stock from September 1 to November 18.

1881.	
Sept. 15	1,500 00
16	5,000 00
17	2,100 00
19	3,300 00
20	1,000 00
21	500 00
22	1,600 00
23	3,000 00
24	1,600 00
27	5,700 00
28	16,500 00
29	53,300 00
30	42,800 00
Oct. 1	192,200 00
3	30,700 00
4	21,273 87
5	10,326 13
6	1,770 00
7	2,000 00
8	16,000 00
10	7,800 00
11	1,000 00
12	400 00
14	3,000 01
15	7,500 00

	17	1,000 00
	18	1,000 00
	21	1,000 00
	22	500 60
	25	2,100 00
	27	13,500 00
	28	4,000 00
Nov.	3	400 00
	7	5,000 00
	11	500 00
	15	500 00
		$461,370 00

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EXHIBIT B.

Report of Bank Examiner to Comptroller, Nov. 18, 1881.

No. of bank, 2373.

Examiner's report of the condition of the "Pacific National Bank," located at Boston, in the county of Suffolk, State of Massachusetts, at 6 o'clock p. m., Nov. 18, 1881.

A. I. Benyon, president; J. M. Pettengill, cashier.

Resources:

		Dollars,	Cts.
1.	Notes and bills discounted	4,186,300	27
2.	Overdrafts	26,539	55
3.	U. S. bonds to secure circulation	500,000	00
4.	U. S. bonds to secure deposits		
5.	U. S. bonds on hand		
6.	Other stocks, bonds, and mortgages		
	See general remarks	273,500	00
7.	Due from app'd reserve agents, viz.		
8.	Due from other national banks	151,700	43
9.	Due from State banks and bankers	4,322	84
10.	Banking-house		
11.	Other real estate		
12.	Furniture and fixtures		
13.	Current expenses $822,232 73		
14.	Taxes paid 289 62		
		22,522	35
15.	Premiums paid	8,593	75
	Interest	38,431	54
23 16.	Checks and other cash items	1,466,243	84
	17. Exch's for C. H., includ'g gold checks		
18.	Bills of other national banks	9,694	00
19.	Bills of State banks		
20.	Fractional currency (including nickels)		

21.	Specie, viz:		
	Silver coin	$3,049 68	
	Gold coin		
	Gold Treasury notes		
			3,049 68
22.	Legal-tender notes		
23.	U. S. cert's of dep. for legal tenders		
24.	5 p.c. red'n fund with Treas. U. S		13,500 00
25.	Other funds with Treas. U. S		
	Cash short		5,311 19
	Total		6,709,709 44

Liabilities:

1.	Capital stock paid in		500,000 00
	New "		461,370 00
2.	Surplus fund		74,142 82
3.	Discount	$65,135 67	
4.	Exchange		
5.	Interest		
6.	Premiums		
7.	Profit and loss	7,080 05	
			72,215 72
8.	Circulation received	$450,000 00	
	On hand and returned		
			450,000 00
9.	State bank circulation outstanding		
10.	Dividends unpaid		435 00
24 11.	Individual deposits, viz:		
	Subject to check	$1,062,540 10	
	Demand certif's	1,695,500 35	
	Time certificates		
	Certified checks		
	Cashier's checks		
			2,758,140 00
12.	United States deposits		
13.	Deposits of U. S. disbursing officers		
14.	Due to national banks		1,473,240 18
15.	Due to State banks and bankers		137,695 18
16.	Notes and bills rediscounted		685,589 61
17.	Bills payable		
	Cash over		96,879 48
	Total		6,709,709 44

Dividends and Surplus.

(Section 5109 of the Revised Statutes of the U. S.)

Date of last dividend, July 1, 1881; amount, $15,000; carried to surplus, $14,239.48.

Loans and discounts:

On paper with two or more individual or firm names	$2,265,315	17
On single-name paper (one person or firm) without other security	301,518	35
On mortgages and other real-estate security	252,659	17
On U. S. bonds payable on demand		
On other stocks, bonds, etc., payable on demand	1,366,807	58
All other loans		

Included in the above are—

Bad debts as defined in section 5204 of the Revised Statutes of the U. S.			
	Other suspended and overdue paper	371,095	87
25	Liabilities of directors (individual and firm) as payers	204,747	30

Loans exceeding the limit prescribed by section 5200 of the Revised Statutes of the U. S., viz:

N. M. Jewett, $100,000; Henry Waterman, $140,000; Geo. E. Horn, $100,000; Chicago, Burlington & Quincy R. R. bonds, $160,000; Katahdin railroad bonds, $99,500; T. C. Weeks, $192,850.

General Remarks.

Directors Pacific National Bank.

Leonard Whitney.	Geo. N. March.
E. M. Fowle.	Lewis Coleman.
Arthur Seward.	Edwin Ray.
John E. Cassidy.	J. H. Whitaker.
M. P. Springer.	John Shepard.
J. H. Sanborn.	A. I. Benyon.

In my last examination of this bank I called especial attention to its manner of making loans by the issuing of certificates of deposit, and suggested that in a financial crisis such a system might be attended with peril. I also called attention to the names of parties who were borrowers, many of which were new to me, and to the character of the collaterals, many of which I know nothing about.

During my examination, which continued through many days, at times entire days and at times fragments of days, with examinations elsewhere carried on to a greater or less extent, I saw some of the directors, Mr. March and Mr. Whitney more than any others, but to all that I saw I expressed anxiety for the welfare of the bank on account of its loans based on its credit represented by certificates

of deposit and the peculiar character of many of its collaterals about which I knew nothing, and urged the importance of a careful examination of the paper and securities of the bank and of the president's manner of doing business. The gentlemen that I saw all assured me that my urgently expressed requests should be complied with, and I felt comparatively easy, for I knew that my examination had been thorough, and if the loans were good the bank was in a healthy and prosperous condition.

The promises made, however, were never kept; and subsequently to the forwarding of my report to the Comptroller, when I inquired of Mr. March, who is still one of the board of directors, if the
26 examination by the directors had been made, he replied that it had not; that the directors met for the purpose of examination, and the president being informed of the purpose of the meeting of the directors "flew into a passion" and said, "If the directors cannot trust the thorough examination of Col. Needham I will resign." Other conversation between a member or members of the board and the president was had on this matter and the examination was abandoned. I replied to Mr. March in language substantially as follows: The responsibility of the bank is upon the directors and they can never shield themselves by placing it upon the president.

Had the examination of the directors been made the character of the collaterals and the system of doing business by the president would have unquestionably been changed and the result would have been different.

In reading the reply of the president to the letter of the Comptroller of Feb. 19th I find that he promised to comply with the express wishes of the Comptroller, but it was in promise alone that the compliance was made. A more reckless management than had ever before been conceived almost immediately after began. The credit of the bank was loaned to a greater and greater extent, and the ambition of the president seemed to be not so much security as how large he could swell his loans with a pledge of the borrower that the certificates of deposit on the money loaned should not be drawn for a period of time after the loan was effected.

For instance, in September, 1881, he loaned one hundred thousand dollars to Geo. E. Horn, of New York, and took as the only security a blank check signed by John Steward. This check has only the signature, no date, no amount, and might have been given for one thing or another, or, as far as I could see, might have been stolen from a check book. We have written to New York to make inquiry, but as yet have no reply.

Another instance: Oct. 7th, 1881, N. M. Jewett borrowed the credit of this bank to the amount of eighty thousand dollars, and an acceptance of an item of real estate to the amount of twenty thousand dollars established an aggregate debit of one hundred thousand dollars. Where the item of real estate called twenty thousand came from I am as yet unable to ascertain. The bank now shows to represent this hundred thousand dollars a mortgage of real estate in

Boston, and, so far as I can see, the security was taken for an original debt and is contrary to the statute.

One instance more will be enough to completely establish my charge of reckless management. In October, 1881, the bank loaned its credit to Henry Waterman for one hundred thousand dollars and took for security $143,800 of the stock of the Southern Maryland railroad, which has no market value and is, at the best, a very doubtful matter.

27 Now, at these times, the bank was absolutely poor, had no money whatever to loan, and the only possible advantage it could get was the temporary use of the means which its credit thus loaned represented, the parties promising not to draw on the credit for two or three months. It seems almost impossible to believe that these and many other equally hazardous transactions were entered into without some ulterior and hidden motive on the part of the president, but I have in vain failed to find one.

The certificates of deposit, in a large number of instances, represent the legitimate deposits of money; many of these draw interest. How large a number are certificates representing credit only I am unable to determine, but evidently this amount is of great magnitude. I enclose herewith paper marked "A," which will show the individual and total certificates issued.

In the same way, by ~~the~~ issuance of certificates under promise that the money should not be drawn for a period of time, although no such expression is indicated on the certificate, the bank has carried on, within the last eight months, an enormous real estate business, to wit:

Of the Home Savings Bank it has purchased real estate in Newton	10,000	
From the same bank, real estate in Boston	10,000	
From the same, another item of real estate in Boston	4,500	
From the same, French's wharf	22,759	17
From the Mercantile Savings Institution, real estate in Boston	40,000	

These are all original and illegal transactions. The deeds of the first-named items bear date in Oct., 1881; of the third-named, Apr. 4th, 1881; of the fourth, October 12th, 1881, and of the fifth the date is January 17th, 1881. I said to the president, in the presence of the directors, no such property was in this bank on the 31st of January, 1881, and he admitted in all their presence that the trade was not consummated until February, 1881, and that the deed was dated back. Most of this property is subject to mortgages, which the bank must carry if it continues to hold, and the bank holds nothing but the equities in its assets.

Together with the directors, I have carefully gone over the call loan (so called), the aggregate amount of which, in round numbers, is sixteen hundred thousand dollars, and in marking off what might be considered doubtful we have an aggregate of nearly one hundred thousand dollars, which would need time and care, and if it came

at all—and very likely a large portion of it might—would come very slowly.

This is independent of the one hundred thousand dollars
28 of Hore, to which I have heretofore alluded, and which has attached to it the blank check of John Steward.

In the discounts there appears the enormous aggregate of three hundred and seventy-one thousand and ninety-five $\frac{55}{100}$ "overdue."

This enormous amount has accumulated from about twenty thousand dollars at the time of my January examination. I herewith send a detailed statement, marked "B." Many of these items have collateral, and are undoubtedly collectible, but a large amount will very likely be slow of collection.

The bank has lodged at the Central National Bank of Boston collateral to secure loans amounting to	$238,502 55
At the Five-Cent Savings bank	107,000
At Brown, Riley & Co.	10,000
At the Howard National Bank	115,000

To secure loans which, with the exception of the loan at the Central National, have a margin which will undoubtedly be realized to apply to the unsecured liabilities of the bank.

At the Central National, independent of the indebtedness acknowledged by this bank, is a claim of two hundred and fifty thousand dollars, which this bank holds nothing to represent. This claim, on the part of the Central, has the *prima facie* evidence of the checks of this bank on the Eliot. There is no doubt but that Mr. Weeks owes this amount to somebody—he admits that—but there is no evidence that he owes it to the Pacific. How the Central National comes in possession of the checks of the Pacific, if it does not owe it that amount, has been a matter of protracted investigation by me.

I have reached the conclusion that the checks were temporarily loaned and not returned, or that they were given for a consideration, and the representative of that consideration has been mislaid or destroyed.

The prospect of litigation to establish this question is very good.

"Other stocks, bonds, and mortgages" I called attention to in my preliminary report, of which I desire this to be the concluding part. That there would be a large loss on these items, if a forced sale was made, there can be no doubt.

All of the bank balances have been verified, with the exception of those noted on the sheet which I herewith send, marked "C." I do not think the differences of unverified balances are of any considerable magnitude.

I herewith also send a sheet, marked "D," which contains a full and complete list of the cash items as they appear in the bank. Many of these items are undoubtedly collectible, and no excuse but
reckless negligence on the part of the president and cashier
29 can explain their accumulation. The Weeks checks, which constitute the great bulk of the list, to wit:

Aug.	9th, 1881.	Check on Broadway National Bank, drawn by Weeks to the order of Day	$10,000
"	19, '81.	Drawn by Weeks to the order of Day	50,000
Sept.	3, '81.	" " "	25,000
Nov.	15, '81.	" " "	20,000
"	" "	" " "	25,000
"	" "	" " "	50,000
"	" "	" " "	50,000
"	" "	Check of Nat'l Security Bank, by Weeks to the order of Day	20,000
"	" "	On North Nat. Bank, by Weeks to the order of Day	75,000
"	" "	On North Nat. Bank, by Weeks to the order of Day	50,000
"	17, "	On North Nat. Bank, by Weeks to the order of Day	877,500
	Aggregating		$1,262,500

Unsecured. No difficulty was experienced in passing Weeks' checks through the clearing-house until Aug. 9th, 1881, when ten thousand dollars came back and was carried in cash items.

On Aug. 19th. one of fifty thousand dollars came back and was placed in cash items. On the 15th day of October checks aggregating three hundred and fifteen thousand dollars came back, and this decided the temporary fate of the bank.

The check given on the seventeenth was a check in settlement, and, according to the books of this bank, represents the entire balance due from Weeks to this bank.

The transaction of taking checks of this bank on the Eliot National Bank and paying in checks drawn on other national banks which went regularly through the clearing had been prosecuted by Weeks to a greater or less extent for a year. During this long time the transactions were made to balance every night. The transactions began in a comparatively small and, so far as I can see, in an apparently legitimate way. From time to time they grew, until the aggregate reached well into a million a day.

In the earlier history of these transactions and for a long time afterward, reaching into the early summer, many gentlemen believe that Mr. Weeks was perfectly solvent, and had it not been for the crisis precipitated by the assassination of the President his failure would not have occurred. Be this as it might, there can be no question as to the illegitimacy of these transactions, out of which the Pacific National Bank never realized one single dollar. No motive, except to do an immense business, can be assigned for the strange conduct in allowing these transactions on the part of the president.

In looking over the assets and liabilities I consider the bank and its shareholders in a most precarious condition, and, unless Mr. Weeks can furnish the equivalent of at least five hundred thousand dollars in current funds and the stockholders pay in one million more, I would not consider even the possibility of reorganization.

I come now to the final consideration of this terrible catastrophe—terrible to the innocent depositors, who may have the inconvenience of long delay and possible loss; terrible to the shareholders, who must in any event for the time being sink their entire capital; terrible for the directors, who had timely warning from the examiner and from the honorable Comptroller of the Currency with regard to

the illegal and careless manner in which the president was conducting the business of the bank, and terrible for the business interests of society, which receives the shock of violated trust so detrimental to all its interests.

Bringing the first great fault to the door of the directors, who, when notice was given, should have persisted in a most rigid examination, I come to the cashier. In his custody were the funds of the bank. To him was submitted every item intended for the clearing. He was a man of long experience. He was taken from a neighboring bank, and the directors were influenced in his selection by his reputation of a careful and conservative man. No one knew better than he that clearing-house checks always represented cash. Out of his hands every day passed the checks that were given to Weeks, and it was for him to know whether or not he received an equivalent.

Could it be possible that for months a business of drawing and balancing checks on the part of Mr. Weeks could have been continued from day to day and a man of long and varied experience like the cashier of this bank have no suspicion? If it is possible to imagine that, for the nine months of increasing business of this character, the cashier had no suspicion on the ninth day of August, 1881, when the first check of Mr. Weeks of ten thousand dollars came back, there could be excuse no longer, but even then no communication was made to a single member of the board of directors, and the drawing of checks and the acceptance of Weeks' checks as an equivalent went on.

On the 19th of August a check of $50,000 came back, but still not a word from the cashier, and on the third of September another, of $25,000, but yet not a word, although these returned and dishonored checks were entered day after day in "cash items" by the teller. The transactions still continued without one word of disclosure being made to the directors from this trusted servant, who was receiving a large salary to guard the interests of the bank.

31 Confidence must begin somewhere; without confidence there can be no credit; without credit there can be no bank; without the bank there can be no extended business. The directors had the right to confide in their cashier, certainly to the extent that he would not accept in exchange for the funds of the bank in the form of a clearing-house check anything that was not the equivalent of money. The cashier cannot hide behind the president. He is an independent officer of the bank and his duties are well and clearly defined. His trust has been violated, and the immediate cause of this disaster is chargeable to him.

The president of this bank must be next considered. He was made president of this bank when the fiery tongue of scandal was pursuing him with relentless ardor. How has he returned the confidence so freely given? No one knew better than he what was and what was not legitimate banking. He knew, for the Comptroller of the Currency had told him that loaning the credit of the bank was illegitimate and perilous business. He knew that making loans through the medium of certificates of deposit was more dangerous

than making loans on legitimate deposits. He knew the transactions of buying real estate, loaning on real estate, loaning in excess of the limit, loaning by the hundreds of thousands of dollars on questionable security and in a careless manner, were all blameworthy and reprehensible. He knew that securing the deposit of a life insurance company by taking out life policies on himself and son and charging the premium of $1,041.05 to the bank was unparalleled in the history of banking. He knew that buying old stone, taken as débris from city houses, and issuing certificates amounting to eleven thousand dollars therefor was monstrous and reckless. He knew that continuing to prosecute his business in a manner condemned by the Comptroller and without asking the directors to share with him in the responsibility was high-handed and unjustifiable. There is no excuse for these two high, trusted, executive officers of the bank.

The matter is still under advisement whether the stockholders will make good the losses or the bank go into the hands of a receiver.

The principal part of the "cash over" in the statement forwarded as a preliminary report belonged in the loan account. The principal part of the discrepancy in the loan account was the result of our hurried manner in taking it and is now mostly explained.

The real estate all appears in the call loans, and I have treated it under the head of "on mortgages and other real estate security."

The classification of the loan is the best I could give in the present condition of affiairs, time collateral loans being treated with the two-named paper.

In "other suspended and overdue" I have classified all the overdue and bad debts, finding it difficult to determine how much of this amount should be treated as "bad debts." My own judgment
32 is that a very considerable amount of the "other suspended and overdue" should strictly be treated that way.

The question has been raised as to whether the new stock is liable to assessment under the law, the increased capital not being all paid in. Can you give me information on this point, as it is very important in the reorganization?

Of illegal and illegitimate transactions not mentioned elsewhere in this report may be stated the following:

An agreement with Taunton Savings Bank to deliver a deed of fifteen houses on Madison Square, Boston		7,500
Four bonds of Nantasket Co.	4,000	
One bond Pleasant Valley & Utah	1,000	
Taken of stockholder to represent balance due on new stock of the bank and standing in the assets as		5,000
100 shares Pacific National Bank purchased for a customer, but no agreement by which the customer can be held		10,400
Three notes of W. B. Worcester, 6,000		18,000

Worcester being a man whose responsibility and place of business are both unknown. In some form or other I have alluded to

the most striking features of the loan account. In summing up the situation I have to say that on the 26th instant I made a statement of the condition of the bank to the directors. This statement I preferred to put in writing, but as they objected to that, fearing it might reach the public, and thus prejudice their case, I submitted it without manuscript. On the 29th, at the request of the directors, I made a statement to some forty gentlemen, composed of the directors and the largest stockholders of the bank, who had been invited in for consultation. This statement was, also, at the request of the directors, made without manuscript, although, being made to a promiscuous body, it was much less complete than my first statement to the bank. At the adjournment of this meeting I was waited upon by a committee, and presented with a letter, of which the following is a copy:

BOSTON, *Nov. 29th*, 1881.

Col. Daniel Needham, bank examiner.

DEAR SIR: At a meeting of the stockholders and directors of the Pacific National Bank, held this day at the office of the association, the following resolutions were adopted unanimously:

Resolved, That the thanks of the directors, stockholders, and depositors of the Pacific National Bank are due and are hereby tendered to Col. Daniel Needham for his earnest efforts to ascertain the condition of the bank, as well as for the valuable suggestions he has made looking to its reorganization.

(Signed) LEWIS COLEMAN, *Chairman.*

I take the liberty to incorporate this communication into this report.

The names of the directors, which will be found under the head
33 of General Remarks, are among the most honored names of Boston's business men, leaving out the name of A. I. Benyon. My view of the situation, from the first, has been of the most serious character. Much of the paper upon which reliance is placed to me looks doubtful, and I am yet to be convinced that the losses may not approximate seventeen hundred and fifty thousand dollars—possibly more. Although it must be admitted that the dishonored checks of Weeks precipitated this disaster, it is to me equally clear that the enormous issue of certificates as a matter of credit on illegal and questionable loans would have brought ruin in the end, and that the end could not be far off. In conclusion, I can only say I have failed to find an explanation of these strange transactions, and, if not based upon criminality, must be explained by idiocy or insanity. I shall advise the Department immediately of the conclusion reached by directors.

DANIEL NEEDHAM, *Examiner.*

To the Comptroller of the Currency, Washington, D. C.

Exhibit C.

Saturday, *Dec.* 10, 1881.

Present: Messrs. Coleman, Ray, Sewall, Shepard, Sanborn, Springer, Whitaker, and Dyer.

Voted, That T. J. Hamilton act as secretary *pro tem.*

Voted, That the reading of the minutes of the previous meeting be dispensed with.

Report of Mr. William J. Best.

The statement I am about to make is necessarily predicated in great measure upon the accuracy of the tables furnished by Col. Needham and the appraisal or valuation that you have put upon the assets where they are represented only by discounted paper. As to the tables of Col. Needham, I assume that they are correct.

On this occasion I shall depart from the regular order in such cases by first directing your attention to the liabilities:

34	They aggregate	$6,466,471 42
	Made up as follows:	
	First. Circulation	450,000 00
	Second. Claims of depositors and creditors	5,055,101 42
	Third. Stockholders	961,370 00
	The nominal or face value of the assets is	6,633,888 68
	And the estimated value	5,102,875 34
	The deficiency, therefore, appears to be	1,363,576 08

In the event of the bank resuming business, the deficiency would be reduced $315,400 by the terms of settlement agreed upon in the adjustment of the account of the Central National Bank; and, as it is now in contemplation to resume, I shall treat the deficiency as being $1,048,176.08. Were the estate converted into money to-day the deficiency would probably reach nearly, if not quite, double the amount last named, but judicious management during the next twelve months could hardly fail to realize from the assets at least $1,000,000 more than they would bring at forced sale. To enable you to form your own conclusions upon this point, I will explain in what manner my tabulation has been made.

The "cash items," so called, foot up $1,107,538.89. This amount includes the whole of the checks illegally issued to Mr. Weeks. In ascertaining what portion of that large sum may be counted as a good asset in the adjustment of the affairs of the bank, I have taken credit for every dollar we have rated as "good," $605,512.08. I have also credited the account with $29,058.09, under the head of "good but slow;" and of the "doubtful," which aggregate $721,953.26, I regard as a good asset the sum of $360,000.

The "bad" assets in this account amount to $51,013.46, which I assume to be worth to the bank in round figures $10,000. In the arrangement you are about to consummate with Mr. Weeks you

expect to have returned $500,000 in the checks and certificates of the Pacific Bank. Information received from Mr. Stone justifies the belief that $565,000 will be surrendered; consequently, I have credited the good assets with $562,500, that being the difference between the $700,000 I have rated as bad and the whole amount due on the Weeks checks.

35 The "receiving teller's cash" appears nominally worth $57,743.02. Of this amount, however, only $20,134.00 can safely be treated as a good asset. The "good but slow" items aggregate $26,424.22; the "doubtful," $6,720, and the "bad," $4,464.80. By proper management, I think the bank may realize $49,558.22. The difference, $8,184.80, I regard as worthless.

The amount of "notes and bills discounted" is placed by Col. Needham at $4,186,300.27. This embraces both call and time loans and several items of considerable magnitude that properly belong under the head of mortgages and real estate. You, gentlemen, have aided me in appraising at least 75% of this item of assets, and I have been guided as to the remainder by your appraisal. The "good live assets" foot up $1,600,000; "good but slow," $600,000; "doubtful," $600,000; "bad," $986,300.24. I believe 50% of the doubtful and about 25% of the bad may be collected within a reasonable time should the estate be fairly managed and the bank resume business. In other words, I regard as a good asset $500,000 of the doubtful and bad classifications of notes and bills discounted, the aggregate being $1,586,300.24.

The "over drafts" amount to $26,639.55, of which sum it is safe to assume that the bank will realize about $10,000.

The other assets, which I need not enumerate, include small amounts of cash, U. S. bonds, and other stocks and bonds, which I have reason to believe can be made readily available for the sums at which they have been entered in my statement.

Included in the "good but slow" item of assets is the large indebtedness of the Bay of Fundy Co., E. M. Fowle, Fowle and Carroll, Beman, Van Steenberg, Eager, and a few others, which I believe can be made to realize the sums set opposite their names, respectively.

As already stated, the deficiency appears to be $1,363,576.08. To make good the assets this sum would be required to-day in addition to the certificates to be surrendered by Weeks.

A DIRECTOR: In addition to the $500,000?

Mr. BEST: Yes, sir; from the deficiency I have named, as

36 previously stated, must be deducted $315,400, the amount to be written off in the settlement proposed to be made with the Central National Bank in the event of the reorganization of the Pacific.

Gentlemen, after a careful examination of the demand certificates issued by this bank and some other details of its management, it is my candid opinion that you can successfully resist an amount of apparent indebtedness more than sufficient to offset the sum of $86,808.08, which is the actual deficiency over and above the assessment of 100% upon the capital, supposing it to be $961,370. I therefore say to you, from the best information at my disposal, that

there need be no difficulty in reorganizing this bank, provided $961,370 in cash shall be put in and the $500,000 to $565,000 of certificates shall be surrendered by Mr. Weeks. In the event, however, that you should fail to have set aside any portion of the bank's indebtedness as it stands to-day, you would have assets of a nominal value of more than a million and a half dollars from which to realize about $86,806.08. A large percentage of these are, of course, absolutely worthless, but many of them are of such a nature and have been placed in this bank under such peculiar circumstances as to justify me in saying that the persons who were parties to the transactions may be proceeded against criminally, aad if vigorous measures could be instituted against them I feel quite certain that a large sum of money, perhaps from four to five thousand dollars—could be realized within the next two or three years, at most, from assets which I now regard as possessing no real value.

Voted, That the report of Mr. Best be accepted.

Voted, The following resolutions:

Resolved, That a reorganization of the Pacific National Bank can and will be immediately effected upon the completion of the surrender of outstanding certificates now held by T. C. Weeks and others, and that the Comptroller of the Currency be requested,
37 upon the completion of such transaction, to order an assessment of 100% in the capital stock of this bank, and that said assessment will make good the capital stock of this bank.

Resolved, That, in view of the progress thus far made in the prosecution of this work, Col. Daniel Needham, the national bank examiner, be requested to forward the result of this meeting, embodied in the above resolution, to the Comptroller of the Currency and request further time to enable the board to complete the transactions now in process necessary for successful reorganization.

Voted, That the counsel of the bank, Richard M. Stone, Jr., and the director, Geo. N. March, now in Washington, be notified of the action of the board as follows:

"Directors have been in session since half past eight. At eleven forty-five resolutions were adopted to reorganize immediately on the surrender of certificates by Weeks, as heretofore agreed, and that the Comptroller be requested to give reasonable time in which to perfect this scheme of reorganization. Weeks may close to-day. Best will see you Monday morning and give all details. See Comptroller and have him direct Colonel Needham as the circumstances require. Answer immediately.

(Signed) LEWIS COLEMAN,
Chairman, for Directors."

Voted, The following resolutions:

Resolved, That W. J. Best, who has conducted the examination of the bank, be requested to proceed to Washington immediately and lay fully and in detail before the Comptroller of the Currency the present condition of this bank and scheme of reorganization and ask his approval of the same.

Voted, The following form of circular to be sent to creditors:

38 "The board of directors of the Pacific National Bank have adopted resolutions covering a scheme of reorganization and the early resumption of business. Upon the surrender of certain illegally issued certificates, which, it is believed, will soon be in the control of the bank, the directors will request the Comptroller of the Currency to assess the stock of the bank for $1,000,000. This amount will place the association upon a sound basis. Nevertheless, time will be required to convert assets that are perfectly good, but which will be sacrificed by a forced sale. Hence, in the interest of the depositors, the directors deem it wise to ask the larger of them to agree to accept payment of their claims in three equal instalments, payable in four, eight, and twelve months, respectively, with interest at the rate of four per cent. per annum.

The directors are of opinion that the assets, which consist chiefly of notes and bills discounted, can be converted within a few months, and therefore reserve the right at any time during the period of extension to pay the whole or any portion of this indebtedness.

We trust that you will see the wisdom of this course and sign the agreement hereto attached and return the same to us at your early convenience.

Respectively, etc.,

LEWIS COLEMAN,
J. H. WHITAKER,
JOHN SHEPARD,
Executive Committee.

For the reason above set forth and in consideration of the sum of one dollar, the receipt whereof is hereby acknowledged, the undersigned hereby agrees to and with Lewis Coleman, J. H. Whitaker, and John Shepard, committee, to extend the time for the payment of the indebtedness of the Pacific National Bank to the amount of —— dollars for four, eight, and twelve months, in three equal instalments, the same to bear interest at the rate of four per cent. per annum until paid."

Voted, To take a recess until four o'clock.

After recess it was voted to adjourn.

THOS. J. HAMILTON,
Secretary pro Tem.

39 EXHIBIT D.

WEDNESDAY, *Dec.* 14, 1881.

A meeting of the directors of the Pacific National Bank was held at 10 o'clock a. m.

Present: Messrs Coleman, Sewall, Ray, Dyer, Shepard, Springer, Fowle, Sanborn, and March.

Voted, That Edwin M. Fowle act as secretary *pro tem.*

Voted, That the reading of the minutes of the last meeting be dispensed with.

Voted, The following resolutions, offered by Mr. Dyer and seconded by Mr. Ray:

Whereas on the 18th day of November, 1881, it was discovered

that the Pacific National Bank was unable to pay on demand its liabilities to depositors and creditors:

And whereas, since the date named, the directors, assisted by Col. Daniel Needham, national bank examiner, and Wm. J. Best, have been engaged in an investigation to determine the liabilities and assets of said bank;

And whereas said investigation enables said directors to fix the apparent liabilities at $6,774,633.60 and the assets at the par or nominal value of $6,782,558.53, showing an apparent excess of assets over liabilities to the amount of $7,924.93;

And whereas said assets are not now worth their par or nominal value, but would probably realize in cash, with judicious management, $5,308,895.34, which would leave an apparent deficiency of $1,465,738.26;

And whereas in the adjustment of the account of the Pacific National Bank with the Central National Bank the latter has agreed, in the event of the reorganization of the Pacific National Bank, to yield of its alleged claims against the former the sum of $315,400, and has also agreed to return to the Pacific National Bank good assets of said bank now held by said Central National Bank as collateral to the amount of $55,252.55, thereby reducing the deficiency of the Pacific National Bank to $1,095,085.71;

And whereas, with such knowledge of the affairs of said Pacific National Bank as the directors have been able to obtain by diligent investigation and inquiry, they are of opinion that it should immediately be reorganized in order fully to protect all of the interests involved;

And whereas the larger part of the assets of said bank consists of notes and bills discounted, of which a considerable portion could not now be converted into money without sacrificing the interests of the creditors of the association;

And whereas T. C. Weeks has returned to this bank $150,000 of its checks and has agreed to return $350,000 of additional checks in a few days: Therefore—

Resolved, That, in the opinion of the directors of said bank, the interests of both creditors and stockholders require its early reorganization.

Resolved, That the Comptroller of the Currency be requested to authorize the stockholders of the association to levy an assessment of 100% upon the par value of the capital stock now paid in, viz., $961,300, upon condition that said Weeks shall return to this bank $350,000 additional checks, as agreed, before said assessment shall be made.

Resolved, That in the event said bank shall be recognized and shall resume business, with the approval of the Comptroller of the Currency, the board of directors will, and they do hereby, guarantee the payment of $133,785.71 out of the assets by them classed as "doubtful" and "bad," aggregating the sum of $1,473,663.19, and now treated by said directors as possessing no present money value, the condition of said guarantee being that it will cease and determine so soon and so far as the said sum of $133,785.71 shall have

been realized from said "doubtful" and "bad" assets, and said directors shall be held only for so much of said sum of $133,785.71 as may not be realized from said "doubtful" and "bad" assets.

Resolved, That, in the opinion of said directors, said assessment upon the stock of said association and the said guarantee of $133,785.71 will place said association upon a sound financial basis; nevertheless, as time will be required to properly convert the assets of the association, which consist chiefly of notes and bills discounted, it is to the interest of the depositors and creditors to agree to a reasonable extension of time for the payment of their several claims. Recognizing this fact, the Central National Bank has agreed to give an extension of one year from Jan. 1, 1882, on the whole amount of its claim, as compromised, viz., $500,000, at 4% per annum.

Resolved, That a copy of these resolutions be forwarded to the Comptroller of the Currency and his approval asked of the scheme of reorganization herein set forth, and that he grant the directors until Jan. 15th, 1882, to perfect said scheme of reorganization.

Resolved, That W. J. Best be, and he is hereby, authorized to reorganize the books of account of the Pacific National Bank and to adopt such measures, with the approval of the board of directors, as he may deem necessary to perfect the scheme for the reorganization of said bank and the collection of its assets in pursuance of the votes of the board of directors this day recorded.

Adjourned.

EDWIN M. FOWLE.
Secretary pro Tem.

41 EXHIBIT E.

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, *December* 13, 1881.

SIR: I had a conference with the committee who arrived here yesterday in reference to the affairs of the Pacific National Bank.

It is proposed to make an assessment for the full amount of the stock of the bank, and it is believed that when this is paid up the capital stock will be unimpaired and the bank in possession of abundant funds to meet all their obligations.

I request that you will, immediately on receipt of this letter, write me in reference to the present condition and prospects of the bank, and if you see any reason to doubt its ability to resume business, as proved.

Very respectfully, JNO. JAY KNOX,
Comptroller.

Daniel Needham, Esq., nat. bank examiner, 54 Milk street, Boston, Mass.

EXHIBIT F.

OFFICE DANIEL NEEDHAM,
NATIONAL BANK EXAMINER, 45 MILK STREET,
BOSTON, *Dec. 14th*, 1881.

SIR: Your letter of the 13th is at hand.

In reply to your inquiry I will say, if Weeks will pay in on his unsecured loans five hundred thousand dollars, as has been proposed, and the arrangement with the Central National Bank with reference to the adjustment of the disputed claim is perfected and an obligation is given by the directors guaranteeing a certain amount of doubtful paper, which amount is stipulated in the resolution, a copy of which, after its passage, will be immediately forwarded to you by the board, then an assessment of one hundred per centum on the present capital of the bank as it now stands on the books would, in my judgment, make the bank solvent.

Many of the directors have the full confidence of the public, and under the conditions I have specified above I should have no doubt of the full ability of the bank to resume.

42 & 43 In speaking of the present capital upon which assessment must be made, I mean the old $500,000, together with the new, of $461,300, making subject to assessment $961,300. In my judgment it is most important that the bank should be revived if possible.

If it falls the Central National must also fall, and the widespread injury could not be estimated.

I am gratified to say that the condition of the bank has been strengthened since it has been in my charge by the securing of some questionable debts, and careful management will undoubtedly save to the bank a large amount which would otherwise be lost.

If the bank goes on upon the plan now laid out, and which will be presented to you for approval within two or three days, and which embodies the features noted in this letter, then there must be a delay of some weeks, and I would like your approval to place my clerk in charge during more or less of the temporary absence I may make in continuing my work of examinations elsewhere.

Very respectfully, DANIEL NEEDHAM,
Nat. Bank Examiner.

To Hon. John J. Knox, Comptroller of the Currency, Washington, D. C.

EXHIBIT G.

MONDAY, *January 2nd*, 1882.

A meeting of the directors was held this p. m. at 3 o'clock.

Present: Messrs. Lewis Coleman, Shepard, Springer, Dyer, Sanborn, Whitaker, and Fowle.

The meeting was called to order by the president, J. H. Whitaker, secretary *pro tem.*

44 Voted, That Lewis Coleman be, and is hereby, authorized to execute and deliver in the name of this bank a contract between this bank and Theodore C. Weeks, and the contract between the Central National Bank, Theodore C. Weeks, and the bank, copies of said contracts being set forth below:

Memorandum of Agreement Between The Pacific National Bank of Boston, and Theodore C. Weeks, Made this Thirty-first Day of December, A. D. 1881.

Said bank agrees to accept in full satisfaction and discharge of any and all claims which it has against said Weeks and against John S. Day, for which it holds no collateral security, amounting to one million five hundred and eighty-seven thousand five hundred dollars (but not including herein the debts against either of said persons, for which it holds collateral security), seven hundred and five thousand dollars to be paid in manner following, viz: Five hundred thousand dollars thereof to be delivered in checks or certificates of deposit heretofore issued by said bank to said Weeks or said Day on or before January 5th, A. D. 1882, "one hundred and thirty-five thousand dollars of the balance of said seven hundred and five thousand dollars in money, and seventy thousand dollars thereof in money, checks, or certificates of deposit, issued as aforesaid, to be delivered on the day of the resumption of business by said bank, but not later than the tenth day of January, A. D. 1882, whether said bank shall then have resumed or not.

Upon the delivery of any of said checks, certificates, or cash said bank is to surrender to said Weeks his checks now held by said bank in the proportion the amount delivered bears to said amount of seven hundred and five thousand dollars, until there shall have been delivered twelve hundred and sixty-two thousand five hundred dollars in said checks, and thereafterwards said bank shall release the balance of its said claim in the same proportion until it is wholly released, and, upon the delivery of said checks and money, amounting to seven hundred and five thousand dollars, said Weeks and said Day are to be released and discharged from all liability to said bank upon any debts due it by them for which it holds no collateral security, amounting, as aforesaid, to one million five hundred and eighty-seven thousand five hundred dollars, and from any and all liabilities on any checks or certificates of deposit of said bank which form a part of said one million five hundred and eighty-seven thousand five hundred dollars which have been heretofore issued by said Pacific National Bank, and which bear the indorsement of said Weeks or said Day; and said bank agrees, without further consideration, to guarantee and save harmless said Weeks and said
45 Day from any liability on their part on any and all checks or certificates of deposit heretofore issued by said bank and forming a part of said one million five hundred and eighty-seven thousand five hundred dollars, and to execute and deliver any and all papers necessary to confirm such release and guaranty, provided said Weeks shall perform this agreement in full.

Said Weeks agrees to make said deliveries upon the terms aforesaid, and the Central National Bank of Boston hereby requests said Weeks to fulfil this agreement and assents thereto. Nothing herein shall be construed as an admission of any liability by said Pacific National Bank to said Central National Bank in case said Pacific National Bank should not resume business or in case this agreement should not be performed.

In witness whereof said Pacific National Bank has caused these presents to be signed and delivered by Lewis Coleman, its president, hereunto duly authorized, and said Weeks has hereunto set his hand and seal the day and year first above written.

(Signed) T. C. WEEKS. [SEAL]

I hereby agree that the within paper shall not be considered as creating any preference in case of insolvency.

(Signed) HENRY D. HYDE,
Att'y for Central National Bank.

Memorandum of an Agreement between The Central National Bank of Boston, The Pacific National Bank of Boston; and Theodore C. Weeks.

Whereas said Central National Bank holds certain checks and certificates of deposit of the Pacific National Bank aforesaid, amounting to eight hundred and fifteen thousand four hundred dollars, after deducting the indorsements thereon, upon eight hundred and ten thousand dollars of which said Weeks and John S. Day are liable as indorsers; and whereas said Central National Bank has collected, out of certain collateral deposited with it by said Pacific National Bank, the sum of about fifty-nine thousand dollars, which it has applied to said debt:

Now, therefore, said Central National Bank agrees to accept, in full satisfaction and discharge of the balance of its said debt against said Pacific National Bank, four hundred and twenty thousand five hundred dollars in the promissory notes of said Pacific National Bank, as follows, viz., one for twenty thousand five hundred dollars, payable in six months; one for fifty thousand dollars, payable in nine months, and one for three hundred and fifty thousand
46 dollars, payable in one year, all of said notes to bear interest at four per cent. per annum, payable semi-annually.

And said Central National Bank further agrees, upon the delivery of said notes and seventy-five thousand dollars of its checks held by said Pacific National Bank, to surrender all collateral received by it from said Pacific National Bank, except said sum of fifty-nine thousand in money, which has been applied as aforesaid; and, further, to surrender all checks and certificates held by it as aforesaid, except three hundred and fifteen thousand four hundred dollars thereof, which are to be delivered to said Weeks, as hereinafter agreed.

And said Central National Bank further agrees to accept of said Weeks, in full satisfaction and discharge of its claims against him and against said Day on said checks and certificates as aforesaid,

three hundred and fifteen thousand four hundred dollars, and the accrued interest on said eight hundred and ten thousand dollars, in the promissory notes of said Week, as follows, viz., two hundred and fifty thousand dollars thereof, averaging six months, with interest at six per cent. per annum, secured by the deposit therewith of two hundred and fifty thousand dollars of the receiver's certificates of the Lebanon Springs Railroad Company, so called, and the balance of sixty-five thousand dollars, and notes to cover said interest, in the notes of said Weeks, averaging and payable in one year, with interest at five per cent per annum; and upon the delivery of said notes and said collateral by said Weeks said Central National Bank agrees to deliver to him three hundred and fifteen thousand four hundred dollars in checks or certificates of said Pacific National Bank, held by said Central National Bank, as aforesaid, to be surrendered by said Weeks to said Pacific National Bank in fulfilment of his agreement with it of even date herewith.

All of said notes, checks, certificates, and collaterals are to be surrendered and delivered, as above provided, simultaneously and on the fifth day of January, A. D. 1882, to American Loan and Trust Company, or some person to be agreed on, in escrow till said Pacific Bank resumes, with consent of Comptroller, and interest is to be adjusted and notes dated as of January second, A. D. 1882; and upon delivery from said escrow said Pacific National Bank and said Central National Bank mutually release each the other from any and all claim, debt, or demand at law or in equity which either holds against the other on account of said eight hundred and fifteen thousand four hundred dollars, and said seventy-five thousand dollars of checks of the Central National Bank, held by said Pacific National Bank; and upon the delivery of said notes and collateral to said Central National Bank by said trust company or person for said Weeks, said Central National Bank releases and discharges said
47 Weeks and said Day from any and all liability on account of said checks or certificates, amounting to eight hundred and fifteen thousand four hundred dollars.

Nothing herein shall be construed as an admission of any liability by said Pacific National Bank to said Central National Bank in case said Pacific National Bank should not resume business or in case this agreement should not be performed.

In witness whereof the said Pacific National Bank has caused these presents to be executed and delivered by Lewis Coleman, its president, and said Central National Bank has caused these to be signed and delivered by Henry D. Hyde, hereunto duly authorized, and said Weeks has hereunto set his hand and seal the day and year first above written.

(Signed) CENTRAL NATIONAL BANK,
By HENRY D. HYDE, *Att'y.* [SEAL.]
T. C. WEEKS. [SEAL.]

Voted, That in the opinion of the said directors an assessment of 100% upon the stock of said association will place it upon a sound financial basis, provided depositors and creditors shall agree to a

reasonable extension of time for the payment of their several claims.

Voted, That depositors and creditors be requested to sign the following agreement and return the same to the bank on or before the 10th inst.

Voted, The following form of circular agreement:

48 We, the undersigned, creditors of the Pacific National Bank of Boston, in consideration of the embarrassed condition of said bank and the agreements of the other parties hereto herein contained, do hereby, for ourselves and our heirs, executors, and administrators, respectfully covenant and agree with said Pacific National Bank of Boston, its successors and assigns, that we will and hereby do extend the time of payment of our several claims as follows, to wit, one-third thereof to be paid in four months from January 1st, 1882; one-third thereof to be paid in eight months from January 1st, 1882; one-third thereof to be paid in twelve months from January 1st, 1882, interest on each instalment to be paid therewith at the rate of four per cent. per annum, the bank to have the right to anticipate any or all of said instalments.

In witness whereof we have hereto set our hands and our common seal, adopted for this purpose only, this second day of January, one thousand eight hundred and eighty-two.

J. H. WHITAKER,
Secretary pro. Tem.

The plaintiff also put in the following testimony of Thayer; defendant, viz:

49 *Testimony of George L. Thayer.*

Q. Your father, I believe, was the old president of the Exchange Bank?

A. He was.

Q. And Mr. Pettengill, the cashier of the Pacific Bank, and Mr. Benyon both came from your father's bank?

A. They did.

Q. Do you know whether they knew that this belonged to the Thayer trust?

A. I am very sure they did. Mr. Benyon was one of the witnesses to my father's will.

Q. Now, what was the purpose of holding it in this form in your name instead of the name of both of you, if any?

(Objected to, and question withdrawn.)

Q. Now, Mr. Thayer, did you pay to the bank any other money for stock—for new stock—except that which you paid on the 28th day of September—I mean aside from the Eaton money?

A. Any other than these two ones?

Q. Yes.

A. No other than these two amounts.

Q. You paid, on the 28th of September, $4,000 for new stock on

account of the forty shares which you held belonging to this trust?
A. I did.
Q. Other than that, did you yourself or with any other person as trustee pay any money to the bank?
A. No, sir.
Q. And this trust was for the benefit of your sister, Olive T. Child?
A. Yes.
Q. You say you think Mr. Pettengill and Mr. Benyon knew that fact?
A. He said he suspected it.
Q. What do you know about it?
A. I know that Mr. Benyon knew it, because I had conversation with him.

Mr. RANNEY: You can state what the conversation was, I think, if it is material. I will waive any objection to it.

Q. Now, Mr. Thayer, after you paid this in you never received any certificate?
A. No.
Q. None was ever tendered to you?
A. Never.
Q. Did you receive notice of the annual meeting?
A. I believe I did.
Q. Did you attend it?
A. I did not.

50 Cross-examination by Mr. RANNEY:

Q. Mr. Thayer, have you got your original certificate here?
A. I think Mr. Benton has it.

(Mr. Benton passes certificate to Mr. Ranney.)

Mr. RANNEY: It runs to George L. Thayer, trustee?
Mr. BENTON: Yes, sir.
Mr. BENTON: The certificate had better be put in evidence.

Q. You were then trustee with your brother?
A. I was.
Q. Now, what was the conversation with Mr. Benyon whereby you think he knew whom you were trustee for?
A. Well, I don't know at this late day that I can give the conversation.
Q. In the first place, when was it, Mr. Thayer?
A. When was the conversation?
Q. Yes.
A. In regard to the bank generally?
Q. Yes.
A. It was at the time the bank was forming. I knew Mr. Benyon and I knew what his difficulties were, and I was rather a sympathizer with him, and I talked with him frequently in regard to it, and it was owing to my personal acquaintance with him that I took

it. I must say that I had an inward conviction that it was not quite right.

Q. You didn't, I suppose, tell him what money you were using to take it, did you?

A. He knew it was from my sister.

Q. You didn't tell him in taking this stock what money you were using? Did you tell him what money you were using to pay for the original stock?

A. I am quite sure so, for another reason.

Q. Give the facts; I don't like reasoning.

A. Not another reason, but another fact.

Q. You may state the fact.

A. My sister, Mrs. Child, was also firmly impressed in regard to Mr. Benyon——

Q. No matter about that.

A. Well, she wanted me to take it, and at her request I did take it, and Mr. Benyon——

Q. Now, did you say anything to Benyon about it?

A. I can't say absolutely at this time what I said.

Q. It has been your idea that he knew about whom you were taking it for, but that is merely an inference of yours?

51 A. No, sir; I am very sure he did know.

Q. Well, state how you know.

A. I cannot state any more than that.

Q. Then it is in your mind simply as a matter of inference that he knew it? If you so told him I want to know when and where it was.

A. I can't tell at this time.

Q. You only believe it was so because of his knowing the contents of your father's will?

A. Well, the whole surroundings of the case lead me to think so. He had a strong Newton clientage and my sister lived in Newton.

Q. Had you more than one trust?

A. No.

Q. You were trustee for others than your sister?

A. I was for Mrs. Eaton; I was her guardian.

Mr. BENTON: Not at this time?

The WITNESS: Well, that stock was taken by me.

Q. Now, when you went to take this new stock you had received notice of the vote, had you not?

A. Notice of what?

Q. Had you received notice of the intention to increase the capital stock when the vote was passed?

A. Yes.

Q. Did you go to see the vote?

A. Go to see the vote?

Q. Yes.

A. No, sir.

Q. And you went on and paid the money. Did you pay for these forty shares and that of Mary J. Eaton at the same time?

A. I did.

Q. And you took a receipt in each case just alike?
A. Yes, sir.
Q. They had printed forms of receipt that they issued?
A. Yes, sir.
Q. Well, you knew that that stock was payable on the 1st of October, didn't you?
A. That I can't tell you about now.
Q. The notice said so, didn't it?
A. Possibly.
Q. And that you were to have interest to the 1st of October—the notice says so?
52 A. I think it said something about interest on prepayments.
Mr. BENTON: This is the notice.
Mr. RANNEY: Perhaps this is the identical notice. Will you produce it as such?

(Counsel passes document to witness for examination.)

The WITNESS: Yes, sir; that is it.
Q. Well, when you went there, whom did you pay the money to?
A. Mr. Pettengill.
Q. Do you know what occurred between you—what conversation occurred?
A. I can't say now.
Q. Well, give it as near as you recollect.
A. Well, I am utterly at a loss to say.
Q. What?
A. I am utterly at a loss to say what I said at that time to him.
Q. You said something about this stock?
A. Well, as near as I can remember, I said, "Well, Pettengill, how are you getting along?" or some such thing as that. "Are they paying in pretty well?" That was at a time when there was a tightness in the money market and things were close. And Pettengill said, "They are not coming up very strong," or something of that sort, and I didn't exactly like the way the subscriptions were coming in.
Q. What did you say about it?
A. I didn't say anything about it.
Q. Why didn't you like it?
A. Because I didn't think they were paying the money in fast enough, according to what Pettengill stated.
Q. Did you make any remark like this: "What will you do if it is not all paid in?"
A. I didn't say it to him, but I said it to Benyon afterwards.
Q. What did you say to him?
A. It rather startled me, and a day or two afterwards I went and saw Benyon and I said, "How is this getting along; how are you getting along?" and he said they didn't pay in very well. I asked him what he would do if it was not paid in and he said, "I suppose we shall have to make it up among ourselves," or something of that

sort. The idea was that if they didn't come up to time it was the custom of the country to make up the stock in that sort of way.

Q. That was some two or three days after you paid it?

A. Yes, sir.

Q. When did you go in again?

53 A. I don't know that I ever went. I don't know that I ever talked with either of them after that.

Q. Did you ever from that time go to make any inquiry about it?

A. Never, to my knowledge.

Q. Well, are you sure you didn't, Mr. Thayer?

A. I am sure that I did not. I was very dissatisfied, and I went and consulted my attorney as to what was best to do about it.

Q. How early did you do that?

A. Shortly after that time I cannot carry the dates in my mind.

Q. Shortly after the first of October?

A. No; I think it was later than that. I don't know when.

Q. Was it after the suspension of the bank or before?

A. I can't tell you now, at this time, when that was.

Q. Between the time you saw Mr. Benyon and the time when the bank suspended business you knew of it, I suppose?

A. I knew of it; yes.

Q. Didn't you go — the bank to make any inquiry?

A. I did not.

Q. Didn't you concern yourself at all to see whether the whole amount of the $500,000 increase had been got?

A. I don't think I took any measures in regard to it at all.

Q. You didn't concern yourself about it?

A. No, sir.

Q. Why did you cease concerning yourself after the time that you thought so much of it that you went and saw Mr. Benyon?

A. Well, I can't tell you now.

Q. You didn't go to inquire whether it had all been taken?

A. I did not.

Q. Well, by your receipt you are intitled to your certificate of stock as well as the others were, if it was all taken up suddenly; in any event, by going and surrendering your receipt you would get the certificate?

A. Yes.

Q. Well, why didn't you go and get the certificate?

A. I consulted my attorney, and he advised me not to.

Q. Why?

A. Perhaps he knows; I can't say. I suppose there was a reason in his mind.

Q. When was that?

54 A. Some time previous to the time I made the notice.

Q. That is, as late as January 10, 1882?

A. I can't carry dates in my mind at all.

Q. Did you do it before the bank suspended, the 18th of November?

A. I think so.

Q. Before it suspended?

A. I think so; yes.

Q. Did you then know that the stock was not taken—the whole amount?

A. It was the common report.

Q. Then you had common report before the bank suspended business that the whole amount of the stock had not been taken, had you?

A. Yes.

Q. Well, are you quite sure of that?

A. I am quite sure of it.

Q. Did you go to see whether the whole amount had been subscribed?

A. I did not.

Q. Never made any inquiries of your own—didn't go to see Mr. Benyon?

A. I did not.

Q. Nor Mr. Pettengill?

A. I did not.

Q. You didn't go and demand your money back, then, until the 10th of January, 1882?

A. I can't carry dates in my mind at all.

Q. No. Well, did you go to see whether the certificates had been issued to other people?

A. I did not.

Q. Well, when the bank failed on November 18, 1881, didn't you go then to inquire into the condition of the bank?

A. I did not.

Q. Made no inquiry about it?

A. No, sir.

Q. Didn't go to ascertain how many certificates had been issued or how much stock had been paid in?

A. No.

Q. Or whether the bank had taken the money that had been paid in by the stockholders and used it in their business as capital and lost it?

A. No, sir.

Q. Did you have any curiosity about it?

55 A. I am not prepared to say I didn't have any curiosity, because it was a curious matter from the beginning. There has been a deal of curiosity from the start.

Q. Well, it would seem that if you had curiosity about it and doubts about it you took no steps to object to it?

A. I had full doubts in my mind what——

Q. You took no steps to object to it to the officers of the company?

A. I turned the matter over to my counsel and left him to take care of the case.

Q. And that is all you did?

A. That is all I did.

Q. And when the bank failed it become quite notorious, didn't it, November 18?

A. Yes, sir.

Q. It was become well known then, was it not?

A. Yes, sir.

Q. That the capital was not increased to the full amount of half a million?

A. Yes.

Q. You knew that?

A. Yes.

Q. How soon after the failure of the bank, November 18?

A. I can't tell you the dates.

Q. Directly?

A. I can't tell you.

Q. You can tell whether it was immediately or directly after?

A. Tell what?

Q. You can tell whether it was directly after that or long time after?

A. I can't carry it in my mind at all.

Q. Isn't it true that it became notorious, on that appearing——

A. That the bank had failed?

Q. Yes; that the half a million hadn't been paid in?

A. Yes, sir.

Q. Didn't you know that Mr. Needham was in charge of the bank and was there making examination?

A. I think I knew it by report.

Q. And didn't you know that immediately after that suspension a proposition was made to resume again—to resuscitate the bank?

A. I did.

Q. What did you know about that?

A. I don't know anything more than they were making endeavors to start again.

56 Q. And did you know or hear of the fact that the Comptroller had directed them to make an assessment of one hundred per cent. on the stock, in order to get money with which to carry on the bank?

A. I heard of that.

Q. And did you know of a stockholders' meeting being called in December?

A. I can't tell you about that. I don't seem to remember. I know there were meetings—I think there were.

Q. Have you kept the notice?

Mr. BENTON: I think I have it.

Mr. RANNEY: The notice you received, have you got that? (Mr. Benton passes the document to Mr. Ranney.) This is January 4, 1882. "At the annual meeting of the stockholders of the Pacific National Bank, to be held at their banking room on Tuesday, January 10, at 11 o'clock a. m., will come up the matter of an assessment on their stock, and if not convenient for you to be present, please sign and return enclosed proxy. Lewis Coleman, president."

Q. Now, how soon did you go and consult counsel?

A. Mr. Benton can tell you that better than I can; I can't remember.

Q. Can't you fix the date?
A. I can't fix any date at all.
Q. Wasn't it after this meeting had been called?
A. I can't tell you; I can't carry the dates in my mind.

Mr. RANNEY (to Mr. Benton): Can you fix the date, Mr. Benton?
Mr. BENTON: It was before the bank suspended that he came to me in the first instance.
Mr. RANNEY: Can you fix how near before the bank suspended?
Mr. BENTON: I don't think I can. When it became notorious that the bank was not getting on well he came and talked with me about it.

Q. Who prepared that notice?
A. What notice do you refer to, sir?
Q. This demand for the money back.
A. Mr. Benton.
Q. Were you present when it was delivered?
A. I was not.

Mr. RANNEY: I understand you to say, Mr. Benton—I take your word for it—that that was delivered on the morning of January 10, before the meeting was held?
Mr. BENTON: Yes.
Mr. RANNEY: Delivered to whom?
Mr. BENTON: To Mr. Coleman.
Mr. RANNEY: Mr. Coleman was then president of the bank.

57 Q. Well, your father was an old bank man, and I don't know but you are a bank director.
A. No, sir; he was president of the Exchange Bank for a good many years.
Q. Did you ever go to look at the records on the books of their proceedings?
A. Never.
Q. Did you ever go to look at the stock ledger?
A. Never.
Q. See any of the books of the bank; did you ever go to look and see what they showed about this increase of stock from the time you paid that money, on the 28th of September, to the time you gave that notice?
A. No, sir; I never looked at the books of the bank at all.
Q. Never consulted any of them?
A. No, sir.
Q. You never went to make any inquiry of any man connected with the bank about the condition and situation of things, either——
A. No, sir.
Q. After you had that talk with Benyon about two days after you paid the subscription?
A. No, sir.
Q. Was your brother in town at that time?
A. No, sir; he resided in New York.

Q. Are you quite sure you did not go to attend the stockholders' meeting?

A. I did not.

Q. Did you employ counsel to go?

A. I think Mr. Benton went; my impression is he went.

Q. He was your counsel?

A. I left the matter entirely in his hands.

Q. You knew that he was there?

A. I assumed that he went there; I assumed he would do what was proper.

Q. You were representing Mary J. Eaton at the time?

A. Yes, sir.

Q. In the case of Mary J. Eaton, if I recollect rightly, there was a proxy you had?

A. Yes, sir.

Q. Was there a proxy in this case?

Mr. BENTON: No.

Q. You knew that Mr. Benton went. Did he report to you afterwards?

A. Well, he has reported so many things that I couldn't tell what he said then.

Q. Well, were you called upon to pay the assessment laid then?

A. Was I called upon?

58 Q. Yes; that voluntary assessment laid January 10?

A. No; I think not.

Q. Did you go to see the president about it?

A. No, sir.

Q. You knew the bank resumed?

A. Yes, sir.

Q. Did you go to see whether you remained on the stock ledger as a stockholder of the eighty shares?

A. No, sir; I never looked at any of the books.

Q. You never looked to ascertain?

A. I never looked to ascertain.

Q. You knew people went and got their certificates?

A. I didn't know that.

Q. You had done business at the bank, hadn't you?

A. I suppose so.

Q. Don't you know that the practice is to go and get the certificate, generally, when a man is entitled to a certificate, assuming that he is entitled to it; assuming that he is entitled to it, you know that the practice is for a man to go there and get it and receipt for it?

A. I never get a certificate before at a bank, but I got it at the time I paid my money.

Q. You considered it your duty to go to the bank and take your certificate if you were entitled to it?

A. I supposed that was the proper course to take.

Q. And you never went to look to see whether your certificate was made out?

A: Never.

Redirect examination by Mr. BENTON:

Q. Did you know that any ever was made out in your name?
A. I did not.
Q. That is, from your knowledge?
A. From my own knowledge; no, sir.
Q. Did you know or did you receive any notice that any was made for you?
A. I did not.
Q. Or that your name was put in a list as a stockholder of the new stock?
A. I did not.
Q. You left this matter wholly with me to investigate and to advise?
A. I did.
59 Q. And from the time you paid your money you did nothing?
A. I took no further action in the matter whatever.
Q. Simply left it in my hands?

Mr. RANNEY: When did you say he left it in your hands?
Mr. BENTON: When?
Mr. RANNEY: Yes.
Mr. BENTON: I am not testifying now.
Mr. RANNEY: I don't want to call you as a witness, but I will take your statement about it.
Mr. BENTON: If you want it as a fact, there is no objection to your having it. I think that is all.

Recross-examination by Mr. RANNEY:

Q. You have no means of fixing the time when you left it in the hands of your counsel?
A. No; I can't fix it definitely.
Q. Well, how nearly will you fix it so that you will swear to it?
A. Oh, I can't swear to it. I am one of the worst men in the world about dates.
Q. And you won't swear it was before the bank suspended?
A. It is impossible for me to remember dates.
Q. You might remember the event, whether you left it in his hands before the bank suspended?
A. I can't tell you; Mr. Benton knows better than I do.
Q. Do you know of any occasion for your leaving it in his hands before the suspension of the bank, on the 18th of November, 1881?
A. Yes; I was dissatisfied with it the day I paid my money.
Q. Dissatisfied with what?
A. I was sorry that I had made it—made the investment.
Q. And yet you didn't exhibit your anxiety by going to make any inquiry after you and Mr. Benton had the conversation?
A. The horse was stolen; no use to go back then.

Mr. RANNEY: That is all.

60 The defendant objected to the evidence embraced in the agreed statement of facts that his name was without his knowledge placed upon the stock ledger, and that the certificate was made in his name without his knowledge as owner of forty shares of the so-called new stock, and also objected to the evidence of the correspondence between the bank examiner and Comptroller, and reports of the bank examiner to the Comptroller, and to the evidence of the proceedings at the annual meeting, on January 10th, 1882, and to evidence of all other proceedings subsequent to the demand made by the defendant for the return of the money paid September 28th, and asked the court to rule that none of these matters were competent evidence against him; and also to rule that he was not bound by the entries made upon the books of the corporation, of which he had no actual knowledge. He also objected to evidence showing that certificates were issued purporting to represent stock in the proposed increase before the failure of the bank, on November 18th, 1881, and asked the court to rule that that fact was not competent as against him. He also asked the court to rule and

61 hold the law as stated in the opinion of the supreme court of Massachusetts in Eaton *v.* Pacific National Bank, reported in 144 Mass. Supreme Court Reports, page 260, and to rule and hold that the vote of the directors of September 13th, 1881, was in the nature of a proposition to stockholders to subscribe for 5,000 shares of new stock and to pay in for it $500,000; that it was necessary that the stock should all be taken and the money all paid in before the new stock could be created; and that it was a condition precedent to the issue of the new stock under this vote that both these things should be done, and that the Comptroller should certify that they had been done, and approve of the increase; and that the defendant paid the money to the bank on September 28th, 1881, upon the implied condition that he should not be required to take new stock unless the proposed amount of 5,000 shares was created, and that as this was not done the defendant did not become a shareholder in respect of the forty shares for which he paid September 28th, 1881, and for the assessment upon which the plaintiff seeks to recover.

The defendant also requested the court to hold and rule that the

62 vote of the directors of December 13th, 1881, was in law an abandonment of the proposed increase of 5,000 shares and the authorization of an increase by the issue of 4,613 shares, and that the act of the directors in including the amount the defendant had paid in to increase the capital by the issue of 5,000 shares in the amount necessary to increase the capital by 4,613 shares did not affect the defendant's legal relations with the bank and make him a shareholder in the increase of 4,613 shares.

The defendant also requested the court to find and rule upon the whole case that he was liable to pay an assessment only upon the forty shares of original stock held by him in the bank, and was not liable to pay the assessment claimed on the forty shares of alleged new stock placed in his name, as set forth in the admitted facts.

The court declined to rule and find as thus requested, but did find

and rule upon the facts agreed by the parties and found by the court as facts, as hereinabove set forth, "as a conclusion of law based upon the admitted facts, without reference to the testimony of Thayer that the stock of the bank was lawfully increased from $500,000
63 to $961,300, and that all the proceedings resulting in such increase were valid and binding on the defendant, and that by virtue of his payment of $4,000, on September 28, 1881, he became a holder of forty shares in the new stock, and that he was therefore liable to assessment upon those shares as well as upon the forty shares originally held by him, and ordered judgment for the plaintiff for the amount of the assessment on 80 shares of stock."

To the foregoing rulings and findings and refusals to rule and find the defendant excepts, and prays that his exceptions may be allowed.

GEORGE L. THAYER, *Trustee*,
By J. H. BENTON, JR., *Attorney*.

Exceptions allowed.

THOMAS L. NELSON,
District Judge.

64 *Assignment of Errors.*

The defendant assigns as errors:

First. The court erred in rendering judgment for the plaintiff for the assessment sued for upon eighty shares of stock and should have ordered judgment for the assessment upon only the forty shares of original stock held by the defendant—that is, for $5,177 alone, and not for $10,354.

Second. The court erred in finding and holding "as a conclusion of law, based upon the admitted facts, without reference to the testimony of Thayer, that the stock of the bank was lawfully increased from $500,000 to $961,300, and that all the proceedings resulting in such increase were valid and binding on the defendant."

Third. The court erred in ruling that the defendant, by virtue of his payment of $4,000 on September 28, 1881, became a holder of forty shares in the new stock, so called, and that he was therefore liable to assessment upon these shares as well as upon the forty shares originally held by him.

65 Fourth. The court erred in declining to rule that the vote of the directors of December 13th, 1881, was in law an abandonment of the proposed increase of 5,000 shares and the authorization of an increase by the issue of 4,613 shares, and in declining to rule that the act of the directors in including the amount the defendant had paid in to increase the capital by 4,613 shares did not affect his legal relations with the bank and make him a shareholder in the increase of 4,613 shares.

Fifth. The court erred in admitting in evidence the correspondence between the bank examiner and Comptroller, and the reports of the bank examiner to the Comptroller, and the proceedings of the annual meeting on January 10th, 1882, and the other evidence shown in the record of proceedings subsequent to the demand made

by the defendant for the return of the money paid September 28th, and in admitting evidence that certificates were issued purporting to represent stock in the proposed increase before the failure of the bank, on November 18, 1881.

Sixth. The court erred in declining to rule that the defendant was not bound by the entries upon the books of the corporation, of which he had no actual knowledge, and in declining to rule that the fact that certificates were issued before the failure of the bank and before the full amount of the proposed new stock was subscribed or paid in was not competent as against him.

66

Seventh. The court erred in declining to rule that the vote of the directors of September 13th, 1881, was in the nature of a proposition to stockholders to subscribe for 5,000 shares of new stock and pay in for it $500,000; that it was necessary that the stock should all be taken and the money all paid in before the new stock could be created, and that it was a condition precedent to the issue of the new stock under this vote that both these things should be done, and that the Comptroller should certify that they had been done and approve of the increase, and that the defendant paid the money to the bank on September 28th, 1881, upon the implied condition that he should not be required to take the new stock unless the proposed amount of $5,000 shares was created, and that as this was not done the defendant did not become a shareholder in respect of the forty shares for which he paid September 28th, 1881.

Wherefore the said George L. Thayer, trustee, plaintiff in error, prays that, for the errors aforesaid, the judgment herein may be reversed.

GEORGE L. THAYER, *Trustee*,
By J. H. BENTON, JR., *Att'y.*

67 UNITED STATES OF AMERICA, }
Massachusetts District, } *ss:*

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record and of all proceedings in the cause entitled Linus M. Price, receiver, *v.* George L. Thayer, determined in said circuit court, and of the assignment of errors and prayer for reversal filed therein.

In testimony whereof I hereto set my hand and affix the seal of said circuit court, at Boston, in said district, this seventh day of October, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred and twelfth.

[Seal of the Circuit Court, Massachusetts.]

JOHN G. STETSON, *Clerk.*

68 *Bond on Writ of Error.*

Know all men by these presents that we, George L. Thayer, of Boston, in the State of Massachusetts, as trustee for Olive T. Child

under the will of George W. Thayer, as principal, and George L. Thayer, individually, and Olive T. Child, of Newton, in said State, as sureties, are held and firmly bound unto Peter Butler, of said Boston, receiver of the Pacific National Bank of Boston, in the full and just sum of fifteen thousand dollars, to be paid to the said Peter Butler, receiver, his certain attorney, successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the seventh day of October, in the year of our Lord one thousand eight hundred and eighty-seven.

Whereas lately at a circuit court of the United States within and for the district of Massachusetts, in a suit depending in said court between said Peter Butler, receiver, plaintiff, and the said George L. Thayer, as such trustee, defendant, judgment was rendered against the said George L. Thayer, trustee, defendant, from the estates and funds in his hands as such trustee, and the said defendant having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation, directed to the said Peter Butler, plaintiff, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said defendant shall prosecute his said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

GEO. L. THAYER, [L. S.]
Trustee for Olive T. Child.
GEO. L. THAYER. [L. S.]
OLIVE T. CHILD. [L. S.]

Signed, sealed, and delivered in presence of—
C. E. WOOD.
MRS. HENRY K. BURRISON.

Approved:
THOMAS L. NELSON,
District Judge.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest: JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

69 The United States of America to Peter Butler, of Boston, in the district of Massachusetts, receiver of the Pacific National Bank of Boston, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on

the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States within and for the district of Massachusetts, wherein George L. Thayer, of said Boston, trustee, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thomas L. Nelson, district judge of the United States for the district of Massachusetts, sitting for the circuit court, this seventh day of October, in the year of our Lord one thousand eight hundred and eighty-seven.

THOS. L. NELSON,
Dist. Judge.

Due, sufficient, and legal service of the foregoing citation is acknowledged.

A. A. RANNEY,
Att'y for Defendant in Error.

Endorsed on cover: Massachusetts C. C. U. S. No. 1308. George L. Thayer, trustee, plaintiff in error, *vs.* Peter Butler, receiver of the Pacific National Bank of Boston. Filed November 23, 1887.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 924.

GEORGE L. THAYER, TRUSTEE, PLAINTIFF IN ERROR,

vs.

PETER BUTLER, RECEIVER, &c.

ADDITIONAL TRANSCRIPT OF RECORD.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, NOVEMBER 30, 1888.

1 Circuit Court of the United States, District of Massachusetts.

PETER BUTLER, Receiver, Plaintiff,
v.
GEORGE L. THAYER, Trustee, Defendant. } No. 2108 (A), Law Docket.

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the following is a true copy of additional proceedings in said circuit court in the above-entitled cause which, by agreement of the parties and order of court, are made a part of the record in said cause and are certified to the Supreme Court of the United States as an addition to the transcript of record annexed to the writ of error and return of the circuit court thereon in said cause filed in said Supreme Court November 23, 1887.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this fifteenth day of November, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and thirteenth.

[Seal of the Circuit Court, Massachusetts.]

JOHN G. STETSON, *Clerk.*

2 *Answer to Declaration in Set-off.*

The plaintiff in said action denies each and every allegation in the defendant's declaration in set-off contained the same as if specified and denied separately and in its order.

By A. A. RANNEY, *Attorney.*

It is agreed that the above answer may be filed as of May 31, 1887, and have effect the same as if actually filed on that day, and that it may be certified up in amendment of and as a part of the record.

J. H. BENTON, JR., *For Def't.*

Order of Court.

NELSON, *J.:*

The foregoing agreement is allowed by the court, and it is ordered that the above answer be filed as of May 31, 1887, and certified to the Supreme Court in amendment of and as a part of the record in said cause.

By the court:

JOHN G. STETSON, *Clerk.*

A true copy.
Attest: JOHN G. STETSON, *Clerk.*

[Endorsed:] Supreme Court U. S. 1888, October term. No. 924. Geo. L. Thayer, trustee, pl'ff in error, *vs.* Peter Butler, rec'r, &c. Additional transcript of record.

[Stamped:] Office Supreme Court U. S. Filed Nov. 21, 1888. James H. McKenney, clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 300.

GEORGE L. THAYER, TRUSTEE,

PLAINTIFF IN ERROR.

v.

PETER BUTLER,

RECEIVER OF THE PACIFIC NATIONAL BANK, OF BOSTON.

BRIEF FOR PLAINTIFF IN ERROR.

J. H. BENTON, JR.,

Counsel for Plaintiff in Error.

Supreme Court of the United States.

No. 300. OCTOBER TERM, 1890.

GEORGE L. THAYER, *Trustee, Plaintiff in Error,*
v.
PETER BUTLER, *Receiver of the Pacific National Bank of Boston.*

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

This case is a writ of error to reverse a judgment of the Circuit Court of the United States for the district of Massachusetts.

The facts upon which the judgment was rendered are substantially the same as in No. 239, The Pacific National Bank of Boston, plaintiff in error, *v.* Mary J. Eaton, argued herewith.

The record contains, in addition to these facts, the testimony of Thayer, plaintiff in error, upon which it was claimed, in the court below, that he must be held to have waived any implied condition that the stock for which he subscribed should be stock in an increase of $500,000.

Record, pages 37, 46.

The Court found and held, however, "as a conclusion of law, based upon the admitted facts without reference to the testimony of Thayer," that he was liable to assessment upon

the forty shares in the new stock, that is, in the alleged increase of the capital of the bank, and ordered judgment for the receiver for the amount of the assessment on eighty shares of stock instead of upon forty, upon which alone the plaintiff in error claimed he was liable to assessment.

Record, page 48.

The errors assigned are seven in number, all of which, with the exception of the fifth and sixth, raise only the questions which are raised and presented in No. 239, argued herewith, and the argument upon these questions in that case is submitted as the argument thereof in this case.

The fifth and sixth assignments of error are that the Court erred in admitting in evidence correspondence between the bank examiner and the comptroller, and the reports of the bank examiner to the comptroller, and the proceedings of the bank at its annual meeting, and in the issue of certificates in the proposed increase before the full amount thereof was subscribed, and entries upon its books of which the defendant had no actual knowledge, made after the failure of the bank and the abandonment of the proposed increase of five thousand shares.

Record, pages 48, 49.

If the other errors assigned are not sustained, these are not sufficient to warrant the reversal of the judgment. In other words, if the ruling of the court below was right upon the main questions involved in the other assignments of error, it must be because the evidence, the admission of which is assigned as error in the fifth and sixth assignments, was competent; and therefore these assignments of error are not insisted upon or argued, except as involved and argued upon the other assignments of error.

II.

The evidence of Thayer is relied upon by the defendant in error, as showing the waiver by him of any implied contract that the shares to be given him for the $4,000 were to be shares in the proposed increase of five thousand shares, and not in a less increase.

The defendant in error says, that even if there was a contract between the plaintiff and the bank when he paid his money to it, and one condition of that contract was that the shares to be given to the plaintiff should be shares in the increase to which he was requested to subscribe and pay, and did subscribe and pay, still the performance of that condition by the bank was waived by the neglect of the plaintiff to dissent from the change of the increase to a less sum; and that, although no shares were ever offered to him, no certificates were ever taken by him, and he had no knowledge that any certificates were made for him, or that his name was entered upon the stock book, and never actually assented to any change in the proposed increase, still, from the facts shown by the testimony of Mr. Thayer, he must be assumed to have known of the vote of Dec. 16, assuming to change the increase, and of the certificate of the comptroller assuming to approve it as changed, and therefore, by failing to actively dissent from such change and demand back his money for twenty-four days, he must be held to have dissented to and ratified the change.

It will be observed that the Circuit Court decided the cause without reference to the testimony of Thayer (Record, page 48). But if it is relied upon here, let us see what it fairly shows to have been his actual knowledge of what was done by the bank. Counsel for defendant, by ingeniously

arranging distinct portions of Thayer's testimony, seeks to produce thereby an impression not warranted by it as a whole. It appears from it, when taken together, that at the time Thayer paid the money, he was told simply that the subscriptions or payments to the stock were not coming in very fast, and that he (Thayer) did not exactly like the way they were coming in; that subsequently he was told by the president that if the stock was not all taken, he (the president) supposed they should have to make it up among themselves, the obvious meaning of which was that the *increase proposed was to be carried out*, not that it was to be changed.

It will be observed that the directors had not fixed any time under the by-law within which the whole amount must be subscribed, and that Thayer's latest knowledge was that subscriptions were going on after Oct. 1, and there was no reason for him to suppose that they would not go on until the whole amount was taken or the proposed increase abandoned. Indeed, the statement of the president to him was in effect a statement that they would go on until the whole $500,000 was subscribed.

Now, it is said that because under this state of affairs, with no time limited for closing the subscriptions, with the suggestion by the president that the subscriptions would go on until the whole amount was taken either by the stockholders or "among themselves" (meaning evidently among the directors or managers of the bank), Thayer was bound to go to the bank before the 16th of November, and ascertain whether the whole amount had been taken, and the increase approved by the comptroller, and a certificate ready for delivery to him. By what rule of law or of business can it be said that his failure to watch this as an individual stockholder has any effect upon his right

to object within a reasonable time, certainly, after the increase was changed? He had paid in his money upon the assumption, which he had a right to make under the law, that the full amount of the increase to which he paid it would be taken, or that the increase would be abandoned. He had been told, after the time as of which the increase was evidently intended to be made (Oct. 1), that subscriptions were going on, and he had a right to assume that they would go on until the proposed increase was made up.

He had a right also to assume that certificates would not be issued in the proposed increase until "the whole amount thereof was taken and paid in," as the law provided. He had a right to assume that no certificate would be made to him until that was done, and that his name would not be entered on the stock ledger until that was done; and until he received actual knowledge that the proposed increase was all taken, paid in and approved, he had a right to assume that he was not a shareholder, and not to be affected by any of the obligations of a shareholder.

What it would have been his duty to do if he had had actual knowledge that his name was entered upon the stock ledger, or upon a stock list such as the law provides shall be kept distinct from the stock ledger, and he was thereby held out by the bank as a stockholder of shares in excess of his original holding, it is not necessary to consider, because it is conceded he had no such actual knowledge. He could have had no such implied knowledge, even if that were sufficient, because it was not lawful to thus enter his name without his consent, certainly until the whole amount of the increase had been taken and paid in, and the increase approved, and therefore, he had a right to assume that it would not be done. There could be no implied knowledge that the directors had done a thing they had no legal right to do.

It is too plain for discussion that up to the time when the directors and the comptroller, acting, as the whole case shows, in collusion with each other, for the purpose of changing the debt which the bank owed to subscribers for new stock, into stock, and thus affecting these subscribers with an obligation which they were not under when the bank failed, assumed, without the consent of such persons, to change the proposed increase to a different increase, Thayer was under no obligation to do anything, because certainly up to that time he had a right to assume that the proposed increase would be carried out, and the whole amount taken, or the proposed increase abandoned.

It is undoubtedly true that Mr. Thayer knew generally that an attempt was to be made "to resuscitate the bank," but what that attempt was to be he had no knowledge, and practically, it is obvious, no means of knowing. It was not until the comptroller, after the receipt of the letter from Needham of the 14th of December, concluded to take the chances upon the question suggested in Needham's report of Nov. 18 (Record, pgae 25), as to the validity of the increase as far as the money had been paid in, and then assumed to decide and advise the directors to change it, and the knowledge of his action and their action in so doing became public, that Mr. Thayer could have any knowledge, special or general, of the attempt to change the proposed increase in any respect whatever. On the contrary, up to that time he was bound to assume that the increase was to be carried out *as proposed*, if at all. Now, after that time it appears that he knew or heard that the comptroller had directed the bank to make an assessment of one hundred per cent, but it does not appear that he knew or heard that that assessment was to be upon anything but that original stock.

In the notice dated Jan. 4, 1882, of the annual meeting

(Record, p. 15), which states that the matter of assessment on the stock will come up at that meeting, there is no intimation of a proposition to assess any stock except the original capital. There is nothing whatever in Thayer's testimony tending to show that he ever had actual knowledge that the directors had assumed to change the increase, or the comptroller had assumed to approve any increase, before he demanded back his money. He undoubtedly knew that the whole amount had not been paid in at the time the bank suspended, and he knew that after the suspension a proposition was made to resuscitate the bank, but he says that all he knew about it was "that they were making endeavors to start again." (Record, page 43.) What those endeavors were he did not know, and could not have known, even from the records of the bank, until Dec. 16. As a matter of fact, he did not know until the annual meeting.

It is to be borne in mind that waiver or ratification must be shown affirmatively. The reasoning is this: The defendant says, "True it is, the plaintiff was not bound by his subscription as a shareholder, nor was he bound by what was subsequently done by the directors and the comptroller, but I propose to show affirmatively that he subsequently ratified what the comptroller and directors had done, and is therefore bound as a shareholder by reason of such ratification." Now, Thayer's testimony fails to show affirmatively any actual knowledge of what the comptroller and directors had done at any time. The whole language is general, evidently tending to show that he knew, what other people may be presumed to have known, that the bank had failed, that the whole amount of increase voted had not been taken, that endeavors were being made to start, that things were not going satisfactorily; mere general hearsay knowledge that any intelligent man upon the street

probably had with reference to the whole matter. But it is said that such vague and indefinite knowledge as this, knowledge that things were not going as they should go, was the reason why Mr. Thayer should at once proceed to investigate and make sure of what was being done, and disaffirm it, if he desired to do so. This assumes that he was bound to assume that the directors and comptroller might do something which they had no right to do, which is not true.

He might well rest upon the assumption, he had a right to rest upon the assumption, that the comptroller and directors in whatever they might do would act within the law, and he could only be bound to disaffirm their action and protest against it when he had actual knowledge that it was what they had no right to do.

But even if he had known of the action of the comptroller on the 16th of December, his disaffirmance thereof was seasonable. He was only bound to disaffirm, if at all, upon the ground that his disaffirmance was necessary to protect the rights of others; that is, to protect those who might deal with the bank upon the assumption that what the comptroller had done and the directors had done was assented to by him. The reasons why persons who knowingly permit themselves to appear as stockholders upon the record should be held as such are well stated in Davis *v.* Baptist Society, 44 Conn. 585, where the Court say: "The stock certificate and the stock register are the basis upon which the comptroller of the currency, in the absence of fraud or mistake, must rely. Some definite and conclusive means of information as to the ownership of stock, for the purpose of assessment, ought to be furnished to creditors, to the receiver, and to the comptroller. This information should be found, in the absence of fraud or mistake, *in*

the certificates of stock and the stock books of the bank." In this case, however, not only was Thayer ignorant that his name stood on the stock ledger as a stockholder, or that the certificate had been made to him, but the certificate remained in the certificate book of the bank, and was as much evidence that he was not a stockholder as the entry of his name in the stock ledger was evidence that he was. The comptroller was not ignorant of the fact that the question had been raised as to whether persons who had paid into the proposed increase could be held liable as stockholders, for he was informed by the bank examiner, in his communication of Nov. 18, as follows: "The question has been raised as to whether the new stock is liable to assessment under the law, the increase of capital not being all paid in. Can you give me information on this point, as it is very important in the reorganization?" (Record, page 25.) And, again, in the communication of the examiner of Dec. 14, the question of whether the capital of the bank was to be taken as its original capital, or that capital plus the amount which had been paid into the proposed increase, was again brought to the attention of the comptroller.

The fact that the liability as shareholders of those who had paid to the proposed increase was questioned and denied was as notorious as the fact of the failure of the bank. It was brought to the attention of the bank examiner at the time the bank suspended, and from that time on was continually discussed. Nobody could, in fact, have been deceived or injured by the fact that the plaintiff's name remained on the stock ledger as charged with forty shares in the increase, and that a certificate of that number of shares in the proposed increase remained in the certificate book, and was not taken by him from the 16th of December to the 10th of January.

The bank was in the hands of the bank examiner, its directors had no control over its assets, it could have incurred no new liabilities in the mean time, no new rights of creditors could have attached; and certainly creditors existing at the time the bank failed could gain no additional rights as against the plaintiff, by reason of any delay to disaffirm the illegal acts of the directors and comptroller from the 16th of December to the 10th of January. Again, the plaintiff repudiated the action of the comptroller and the directors before any action had been taken upon the basis of the change in the increase.

It may be suggested that if the plaintiff had disaffirmed before the certificate of the directors of Dec. 16 to the comptroller, the directors would not have made that certificate, and the comptroller would not have been deceived by it into believing that those who had paid to the increase of 5,000 shares were willing to be held as subscribers to a less increase. But it appears that, as a matter of fact, the question of whether they could be held was raised as early as Nov. 18, and the comptroller knew that there was question upon this point, and was not deceived by the certificate of the directors. It also appears that that certificate was sent to him as the result of discussion between himself and a committee of the directors, after explanation of the situation of the bank's affairs to him, in which it must be presumed the entire situation was made known to him. (Record, page 12.)

The plaintiff acted with due diligence, for as soon as it became evident to him, by the notice of Jan. 4, that at the annual meeting on Jan. 10 the matter of assessment on the stock would come up, and before the meeting, he demanded back his money. It is to be borne in mind that he had done nothing to affirm the action of the directors in attempting

to change the proposed increase. He had not waived his right to insist that the increase should be that which was proposed to him, and to which he paid his money; he had taken no certificate; he had done no act upon the basis of ownership of shares in the proposed increase, or in any increase. The claim of ratification or assent by him is therefore *simply that by reason of his omission*, from the 16th of December, or as soon after that as he could, perhaps, have known, if he had investigated, that the directors had attempted to change this increase, till the 10th of January before the annual meeting, to demand his money back, he is to be held to have assented to the proposed change, and to have waived his right to claim that he should have shares in the increase proposed, and not in a different one.

It is said that the case is like Delano *v.* Butler; but the facts are radically different. There, after the plaintiff paid his subscription, he took his certificates, and by so doing impliedly directed the bank to place his name upon its stock ledger as the owner of shares represented by the certificate. He then kept his certificate, acted as the owner of shares represented by it, and paid an assesement upon them. He was notified of the annual meeting at which an assessment was voted upon his stock. He did not attend the meeting; he did not disaffirm what the directors had done, but affirmed it and ratified it, *i. e.*, he knowingly *acted affirmatively;* affirmatively held himself out as a shareholder in the changed increase, till he was sued for assessment in November, 1882; while in this case, plaintiff took no certificate, did no act, and within twenty-four days from the time the vote was adopted assuming to change the increase, repudiated the action of the directors, and demanded back his money.

Again, it should be observed that the book which is claimed to be the stock list required by the statute to be

kept is not what the law requires. It is a mere debit and credit account with each stockholder. It is impossible to ascertain from it the capital of the bank without balancing each account and adding the net result of all the accounts together. It is impossible to ascertain from it the number of shares owned by each stockholder at any time without striking the balance of his account; and, as appears from the account with the plaintiff, such accounts were not from time to time balanced. (Record, page 12.)

Sect. 5210, U. S. Rev. Stats., provides that "the president and cashier of every National Banking Association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the Association, and the number of shares held by each, in the office where its business is transacted. Such lists shall be subject to the inspection of all shareholders and creditors of the Association, etc., during business hours. A copy of such list, verified by the oath of the president or cashier, shall be transmitted to the Comptroller of the Currency," etc. This provision looks to a list, and not to a ledger containing accounts with individual stockholders. It looks to a list which is to be kept, not to a book in which accounts are to be kept, which may be balanced, and then a list made therefrom.

> Washington Co. Mutual Ins. Co. *v.* Hastings, 2 Allen, 398.

Merely permitting one's name to be upon the stock ledger, when it is not borne upon such a stock list as the statute provides for, is not permitting one's name to be held out to creditors as a holder of shares shown upon the stock ledger. The statute does not make the stock ledger subject to the inspection of creditors, unless it shall be held that it is such

a list as is required by the above section, which I submit cannot be.

Mere silence, even with knowledge, is not a waiver of the performance of a condition, *i. e.*, of the performance of a contract: there must be *affirmative action* amounting to the acceptance of performance without the condition.

Bucksport, etc., *v.* Brewer, 67 Me. 303.
B. & Mo. R. R. *v.* Boestler, 15 Iowa, 559.
Jewett *v.* Lawrenceburg, etc., Railway, 10 Ind. 543.

In this case the money paid was recovered back.

Ridgefield, etc., Railway *v.* Reynolds, 46 Conn. 379.

Reliance seems to be placed by the plaintiff upon the fact that the plaintiff did not insist upon subscription books being opened under the provisions of the eleventh by-law, and it is claimed that he *declined* to subscribe, and therefore must be held to have made his payment without reference to whether anybody else subscribed or paid, or not. But the plaintiff was *bound to pay* before he could have any right to a certificate, or before any step could be taken to make a valid increase. A mere subscription by all the stockholders of the full amount of the proposed increase would, under the United States statute, have amounted to nothing. The language is, "No increase of capital shall be valid until the whole amount of the increase is *paid in*." The plaintiff was, therefore, compelled to pay in his money before the final action of the comptroller in order to become entitled to any part of the new stock, and a mere waiver of the opening of subscription books, or the mere failure, as was the case here, on the part of the bank to insist that there should be subscriptions,

was a mere waiver or failure of that which was of no consequence. But this plaintiff did not decline to subscribe. He was never requested to subscribe. The notice sent him has lines at the top and the bottom, but whether for the purpose of writing a subscription upon them, or for the purpose of writing the transfer of the privilege of subscribing, does not appear. There is no evidence of any request to put anything upon these lines.

The plaintiff was at least entitled to notice of the performance or non-performance of the condition attached to his payment before he was bound to take any action. Whether the proposed increase of five thousand shares was all paid in and approved by the comptroller was a matter purely within the knowledge of the corporation, and he had a right to assume that it would notify him.

Chase *v.* Sycamore, etc., R. R., 38 Ill. 215.
Trott *v.* Sarchett, 10 Ohio St. 241.

Much stress has been laid by upon what is called the "*de facto* increase of the capital of the bank." But no one can be charged upon the basis of a *de facto* increase of stock, or of any other act, simply because it is an act, whether legal or not, *if he does not take part in the act, and recognize and act upon the basis of the* de facto *increase or act done.*

The vote of Dec. 13 was necessarily an abandonment of the increase proposed by the vote of Sept. 13, and while the increase or changed increase proposed by it was *de facto* valid as to those who had paid in towards the increase originally proposed, and who *assented* to take certificates in the new proposed increase, or act upon shares therein, instead of insisting upon shares in the increase to which they had paid, the fact that the persons who did not see fit to do so paid in their money, as they were bound to do under

the law before they could become entitled to certificates, and that the officers of the bank, without their knowledge, illegally and wrongfully applied that money to the general uses and purposes of the bank, and issued to other persons, who saw fit to take them and act upon them, certificates which they had no right to issue, and did thus create *de facto* shares of stock *as to persons who saw fit to take them and act upon them*, can have no effect upon the rights of persons who did not take certificates and act upon them.

J. H. BENTON, JR.

Supreme Court of the United States.

GEORGE L. THAYER, TRUSTEE,

IN ERROR,

v.

BUTLER.

TO CIRCUIT COURT.

Brief of the Defendant in Error.

This case was brought to enforce the individual liability of the plaintiff in error here, the defendant in the court below. It is an exact duplicate of the case of Butler, in error, *v.* Eaton, brought up on writ of error to the Circuit Court, and argued herewith, excluding the question of estoppel raised in the latter. The court below gave judgment for the full amount claimed by the receiver, and we ask for its confirmation.

The exception taken raises a point of law upon a claim made by Mr. Thayer, the same as was made by Miss Eaton in her State court case, where he likewise sued for the purpose of recovering back his money paid for new stock, his suit, still pending in that court and awaiting. The proposition of law, made adversely and not sustained by the court below, forms the only subject of exception, as found in the record, on page 50.

It will be seen that the precise question has been adjudicated in the Aspinwall case, and is argued on the brief filed in the Circuit Court Eaton case. We need only refer to the same.

If the Court have occasion to go further and consider the question of waiver and acquiescence, as affected by the conduct of Mr. Thayer, his undisputed evidence, and the facts proved thereby, and conceded, they will find the case clear upon this point also.

He swears, undisputed, to what shows general knowledge of all the essential facts.

A. A. RANNEY,
for Defendant in Error.

Office Supreme Court U. S.
FILED,
FEB 13 1891

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 300.

GEORGE L. THAYER, Tr., *in Error*,

v.

PETER BUTLER, *Receiver*.

ADDENDA TO BRIEF OF THE RECEIVER.

The decision of this court in Aspinwall *v.* Butler, 133 U. S. 595, in affirmation and extension of the doctrine of Delano *v.* Butler, 118 U. S. 634, made since the original brief was filed, serves to narrow the discussion in this case. The finding and ruling of the court below is in accord with the same (Rec., pages 49, 50). The decision is put squarely on the ground of the legality and validity of the increased capital stock of $461,300, and of the ownership, on the part of the plaintiff in error, of the forty shares which she elected to take and paid for.

The agreed facts and evidence go beyond this, and present the case in all of its aspects of waiver, acquiescence and estoppel. But the discussion may well be limited to the narrower circle of the decision as made, in denial of the doctrine of the State court Eaton case, on which rested the main contention of the other side (Rec., page 46).

The record shows various other claims as made at the hearing in a kind of omnibus contention, with no specific ruling or

exception applicable to each branch of the same as was required in order to make it available. It will be seen that the statement of the agreed facts and evidence was drawn to comprehend all of the aspects of the case, and the decision, as made, comprehends only what were essential thereto and which were not in dispute. There is no statement of the facts in detail as found by the court. But those which are comprehended in the ruling of the court were clear and undisputed. The ruling and finding as made are expressed thus (Rec., pages 49, 50) : —

"The court declined to rule and find as thus requested, but did find and rule upon the facts agreed by the parties and found by the court as facts, as hereinbefore set forth, as a conclusion of law based upon the admitted facts, without reference to the testimony of Thayer, that the stock of the bank was lawfully increased from $500,000 to $961,300, and that all the proceedings resulting in such increase were valid and binding on the defendant; and that by virtue of his payment of $4,000, on Sept. 28, 1881, he became the holder of forty shares in the new stock, and that he was therefore liable to assessment upon those shares as well as upon the forty shares originally held by him."

This comprehends in its scope a ruling upon the effect of the original vote of the directors, the prepayment of the money on notice thereof, the vote of the directors of Dec. 13, 1881, the notice of the bank to the Comptroller of the Currency of that date, and the approval and approval certificate given by that official, as also, if necessary, the action of the stockholders in the meeting of Jan. 10, 1882, in ratification of the proceedings, on which is based the decision of this court in the Delano and Aspinwall cases, in denial of the doctrine of the State court in the Eaton case invoked in the request of the opposite counsel.

The statement of facts and evidence agreed to and stated

in the bill of exceptions was drawn and made in view of all of the aspects of the case, including questions of good faith on the part of the directors and the Comptroller of the Currency in the premises.

If a general exception such as is stated at the close of the bill is allowable or effective as covering each detail of the omnibus of requests previously stated, which we deny, then it is clear that the court did not err.

1. The entry of the name of the plaintiff in error upon the stock ledger was impliedly authorized by what occurred on his part by the election made and the prepayment of the money under the circumstances appearing. This was done as matter of course and of duty under R. S., § 5210.

2. The issue of the certificate followed likewise in course, and was one of the elements constituting ownership.

The question then in connection with the same was whether the plaintiff in error did not by his conduct impliedly authorize this to be done, with presumed or inferred knowledge of the facts, and whether on the facts it was not the duty of the association to do this, and whether this did not make the plaintiff the owner of the stock, although he did not actually take the certificate away.

These facts were the basis on which inferences were to be drawn, and as elements constituting ownership.

3. What was done at the annual meeting, called in obedience to the action of the Comptroller of the Currency of Dec. 16, 1881, was competent on the question of ratification, the plaintiff in error being present thereat by his attorney (page 15), or whether he was present or not, as held in the Aspinwall case. The action taken was at a regular meeting duly called by the stockholders, and the action taken was corporate action.

4. The issue of the certificates before Nov. 14, 1881, was a part of the *de facto* increase, and it was competent on the

issue of ownership of the stock with the question whether of inferred or implied knowledge on the part of Mr. Thayer, from the stock ledger open to his inspection and the notoriety of the facts, and what was sworn to by him in his evidence, all of which was open in the case shown.

5. As to the correspondence between the bank examiner and the Comptroller of the Currency, and the reports of the bank examiner to the comptroller.

It is to be observed that the case, as widely presented on the agreed facts and evidence, involved the possible question of good faith or fraud in the proceedings on the part of the directors and the comptroller.

The action and report of the bank examiner was official, and was had and made also by virtue of a vote of the directors. (Report, page 12.) The other communications between the bank and the comptroller preceded the demand made by Mr. Thayer on Jan. 10, 1882, and were official on the part of the bank and the comptroller.

At best, under the finding and decision of the court below, these communications become immaterial. No objection was made as to any particular portion of them.

The court, in its comprehensive ruling, upheld the validity of the increased capital stock on the facts agreed and found by it, and found ownership of the new stock by Mr. Thayer.

It is enough if the ruling can be sustained on the material facts agreed to, or in any view of the same, under the omnibus exception alone taken at the close of the bill (Report, page 18), there being no specific and detailed finding of the facts of the case. That the new stock was legal and valid, and was effected by the exertion of competent authority on the direct facts conceded, is fully adjudged in the cases of Delano and Aspinwall, *supra*.

A. A. RANNEY,
For the Receiver.

Office Supreme Court U. S.
FILED.
JUL 29 1890
JAMES. H. McKENNEY.
CLERK.

Supreme Court of the United States.

Pacific National Bank.

No. 289 PETER BUTLER, RECEIVER IN ERROR, *vs.* MARY J. EATON.

No. 300 SAME *vs.* SAME.

No. 301 GEORGE L. THAYER, TRUSTEE IN ERROR, *vs.* PETER BUTLER, RECEIVER.

MOTION OF PETER BUTLER, THAT THE CASES BE ARGUED TOGETHER.

The said Peter Butler, plaintiff in error in two cases and defendant in error in one case, respectfully represents that said cases depend for their determination upon the same state of facts substantially, and upon the same general questions of law, with the exception that there is in the second one named a subordinate additional question, arising out of an alleged estoppel as *res adjudicata*, because of a judgment by the State Court in the first case named above. The general facts are the same, so far as deemed material, as those in Delano *v.* Butler, 118 U. S. 634, and Aspinwall *v.* Butler, 133 U. S. 595.

The first case is a writ of error, to the State Court, for the review of a judgment, to the effect that Mrs. Eaton was entitled to recover the money paid for forty shares of new stock, because the increased capital stock was made $462,300 instead of $500,000, as first voted by the directors. The second suit was brought in the Federal Court for the purposes of enforcing her individual liability on account of the same, together with forty shares of the old stock. The court below held the said judgment of the State Court to be a bar to the recovery so far as the new stock was concerned. The third case is an exact duplicate of the second, exclusive of the said question of estoppel. The same counsel appear in each case.

The main question to be argued, common to all the cases, is whether the increased capital stock as effected was legal and valid,

and the respective parties paying the money become the owners of the shares paid for and issued to them; with the further said question of estoppel as applicable alone to one of the cases.

The said Butler, therefore, applies and respectfully moves that the last two cases be argued and heard with the first one named, when it is reached in order.

PETER BUTLER, Receiver
By his Attorney,
A. A. RANNEY.

Personally appeared Peter Butler, receiver, and made oath to the truth of the facts stated in the foregoing petition or motion.

Before me,

[SEAL.] ISAIAH R. CLARK,
Notary Public.

I, A. A. Ranney, counsel for the said receiver, Butler, hereby certify that the facts stated in the foregoing petition or motion are true.

A. A. RANNEY.

Nos. 604, 605 and 542.

Supreme Court of the United States.

GEO. L. THAYER, TR. IN ERROR, *v.* PETER BUTLER, RECEIVER.

PETER BUTLER, RECEIVER IN ERROR, *v.* MARY J. EATON.

SAME *v.* SAME.

APPLICATION AND MOTION TO ADVANCE.

The said Peter Butler, Receiver, asks leave and moves that the said cases be advanced and set down for argument at some day to be named, either at the present term or on or near the first day of the next term. The reason is that the vital and determining points of law raised, and on which the decision depends, are the same as those just adjudicated by this Court conclusively in the case of Aspinwall in error *v.* Butler. The only difference between them is in the facts (not deemed material) that Mr. Thayer and Miss Eaton, each as the owner of forty shares of old stock, availed themselves of the right to that number of shares of the new stock proposed, by making their election each orally and paying the money on Sept. 28, 1881. The certificates were issued and made out, dated Oct. 1, 1881, ready for delivery on call, and the parties were respectively entered in the books of the bank as owners of the new shares so taken and paid for, and so remained until the final failure of the bank; but they did not call and actually take the certificates. The first two suits are brought to enforce the individual liability, and the third to recover back the money paid for the new stock. There is in the second suit a question as to the effect of the decision in the State Court in the third case as *res adjudicata*. Counsel of the opposite parties was notified of the agreement to submit the Aspinwall case under Rule 20, and was asked, and had an opportunity

given him, to do likewise, and could have joined in the argument if he desired, but omitted and declined to do so. The records of the cases are printed and are referred to.

PETER BUTLER,
Receiver.

By A. A. Ramsey, his atty.

I, Peter Butler, Receiver, on oath say that the statements contained in the foregoing petition or motion are true.

Peter Butler

Subscribed and sworn to before me,

ISAIAH R. CLARK.
Notary Public.

Peter Butler, the ~~defendant~~ receiver in error, on oath says that notice of the above petition or motion was on this ~~22d~~ 25th day of March, A.D. 1890, given in hand to the counsel of record for Mary J. Eaton and George L. Thayer, Tr., with a copy of the same delivered to him, and that the motion would be called up in Court and submitted on March 31, 1890.

Peter Butler

Subscribed and sworn to before me,

ISAIAH R. CLARK.
Notary Public.